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REPORTS OF CASES
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1912.

VOLUME XCI.

o **HARRY C. LINDSAY,**
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COURT,

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1912.

**HENRY AMEND, ADMINISTRATOR, APPELLEE, V. LINCOLN &
NORTHWESTERN RAILROAD COMPANY; CHICAGO, BUR-
LINGTON & QUINCY RAILROAD COMPANY, APPELLANT.**

FILED MARCH 12, 1912. No. 16,886.

- 1. Negligence: LIABILITY FOR DEATH FROM DROWNING: ACT OF GOD.**
What is known in law as the "Act of God" is an accident or unexpected occurrence due directly and exclusively to natural causes, without human intervention, the resulting injury or damage not having been produced or contributed to by the hand of man. If a resulting injury is in part produced by the wrongful or negligent act of any person, such person will be held liable therefor.
- 2. ———: QUESTION FOR JURY.** "Whether the natural connection of events is maintained or interrupted by the introduction of a new and independent cause is usually a question of fact and not of law." *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448.
- 3. Railroads: OBSTRUCTION OF FLOOD-WATERS: LIABILITY FOR DEATH.**
Where a good faith effort, without negligence, is made to rescue one from a place of danger, wrongfully or negligently caused by another, such effort, even if unsuccessful, will not relieve the wrongdoer from liability for the consequences of his act.
- 4. Evidence: INTOXICATION.** The evidence, copied in the opinion, is examined, and found not sufficient to prove the intoxication of a rescuing party.
- 5. Instructions,** a portion of which are set out in the opinion, are examined, and no prejudicial error found in them.
- 6. Evidence.** The evidence is found sufficient to support the verdict of the jury.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

James E. Kelby, Byron Clark and Stout & Rose, for appellant.

Wilmer B. Comstock, contra.

REESE, C. J.

This is an action for damages alleged to have been sustained by reason of the death by drowning of the daughter of the plaintiff, who sues as the administrator of her estate. The decedent was drowned on the 6th day of July, 1908. There is no serious question as to the sufficiency of the pleadings, and there is little conflict in the evidence. Neither the pleadings nor evidence will be set out except so far as may appear from the practically conceded facts. Plaintiff recovered, and defendant appeals.

The plaintiff with his family resided in that part of the western portion of the city of Lincoln generally known as the "Salt creek bottoms." Prior to the date of the drowning of the decedent (in 1906) the defendant, in connection with other improvements in that vicinity, constructed a railroad grade across the principal portion of the Salt creek valley, the surface of which, with the ties and rails, was several feet above the general level of the valley, depending upon the topography of the ground. There was one opening left in the embankment for the passage of water, being a concrete bridge 250 feet in length across Salt creek. The bridge rested on nine concrete piers four feet thick at the bottom and two feet thick at the top, and which were 25 feet apart from center to center, leaving a waterway of about 220 feet in length under the bridge. Resting on these piers was a concrete "slab" two and one-half feet thick, above which were placed the ties and rails. The remainder of the work was a solid fill. We have been unable to ascertain the exact length of the embankment. It

is said by appellee in his brief to be three-quarters of a mile long.

An important question of fact is as to the capacity of the bridge to permit flood-waters to pass through. The evidence shows without conflict that the whole valley is subject to occasional overflow and has been since the first settlement of the country, and that the flood-waters have with more or less frequency covered the whole surface of the valley, which was known to defendant long prior to the final construction and completion of the grade. The channel of a stream known as "Middle creek," coming from the west and subject to overflow, was changed so as to empty its waters into Salt creek above the bridge, thus very materially increasing the quantity of water which would have to pass under it. During the forenoon of the 6th day of July, 1908, owing to very heavy rains, the waters from Salt creek and Middle creek came down to the embankment and flooded the valley above it so that the water at and around plaintiff's residence rose to the depth of six or seven feet. Later on, but on the same day, the impounded waters broke over the fill and railroad tracks and ran down onto the lower side. It is said by some of the witnesses that at that time the water above the fill was five or six feet higher than the water below. This, with other facts which we do not detail, was sufficient to justify the jury in finding that the outlet was inadequate. Water when at rest seeks its level, and had it not been for the obstruction the flood would have presented practically a level surface, and as a consequence the water would not have been so deep above the fill. Judged by this evidence, there was sufficient to justify a finding by the jury that there was a faulty construction of the track bed, and by reason thereof the waters were held back and the depth of the flood greatly increased.

It is shown that the rainfall at the city of Lincoln on the 5th and 6th of July, 1908, was greater than at any time since the year 1884 (the government records having been first kept in 1885) and .86 of an inch greater than

the flood of August 15 and 16, 1900. That there was an unprecedented precipitation to that extent cannot well be doubted. It is urged that this constituted an act of God and for which defendant could not be held responsible. This might be urged with more persuasive force had it not been for the construction of the obstructing fill which acted as a dam and greatly augmented the danger.

The question of the negligence of defendant in constructing its fill and roadbed and its provision for the escape of flood-waters was one of fact for the consideration of the jury. The jury having found by their verdict, supported by sufficient evidence, that such was the fact, we must for the purposes of this appeal accept it as final. It is pretty well settled that if a wrong or act of negligence is committed and that act contributes proximately to the injury; even though combined or in conjunction with the act of God, the wrongdoer will be liable. It is not deemed necessary to discuss this subject further, as we think it clear that, whenever any wrongful, careless or negligent act of man contributes to an injury, he cannot escape liability by showing that such injury was produced in part by the act of God. Hence, if in negligently damming a stream and such floods come as might with propriety be denominated the act of God, and by reason of the negligently constructed dam an injury resulted greater than would have been suffered had the dam not been so constructed, the wrongdoer cannot escape liability by showing that the storm flood was, of itself, the act of God. As stated by the decisions and authorities, if by any act of man in conjunction with the act of nature an injury is inflicted, he will be held to respond for the injury suffered. In 1 Cyc. 758, it is said that the act of God "may be defined to be any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains or care, reasonably to have been expected, could have been prevented"—citing cases in note. 1 Words and Phrases, 118.

It is shown that early on the morning of the 6th of July,

1908, the water above the railroad embankment, or grade, rapidly accumulated over the surface of the valley. Plaintiff had left his home at an early hour to go into the business section of the city of Lincoln on an errand. During his absence, which was not prolonged, the water rose to such an extent as to prevent his return to his home. His family were in the residence. As the flood increased plaintiff's wife placed their children upon the table. The water rose in the house to a depth of over three feet. Finding that she could not save the family in that way she made her way to the porch, and with the help of a son she and the children were lifted to the roof of the porch. The rain was falling and they were unprotected when two men came to the house in a small boat. The water was at that time six or seven feet deep in the street and yard in front of the house, and all escape by the unaided efforts of the family was completely cut off. A part of the family, including decedent, were lifted from the porch roof into the boat, and as thus laden the boat started for a place of safety. On the way toward the shore the boat came in collision with a telegraph or telephone pole, was overturned, and plaintiff's daughter drowned. There is no evidence of any wilful or wrongful act on the part of those in charge of the boat. The overturning of the craft is not shown to be other than accidental and without fault. A great number of boats were in use, and hundreds of people were transferred from their places of danger in their homes to safety.

It is insisted that plaintiff's family were in a safe place and out of danger while upon the porch roof; that their removal therefrom was the interference by a new and independent element or agency which caused the accident, but which was not in any way procured, set on foot or contributed to by defendant; that there could be no connection in natural sequence between the construction of the embankment, even if negligently and wrongfully made, and the drowning of plaintiff's daughter. The rule of law upon this subject is well stated by Post, J., in *St. Joseph*

Amend v. Lincoln & N. W. R. Co.

& *G. I. R. Co. v. Hedge*, 44 Neb. 448, where it is said: "The question in all such cases is whether the facts shown constitute a continuous succession of events so linked together as to make a natural whole, or was there a new and independent cause intervening between the wrong and the injury. The intervening cause must be one not produced by the alleged wrongful act or omission, but independent of it, and adequate to produce the result in question. There may be, it is evident, a succession of intermediate causes, each dependent upon the one preceding it and all so connected with the primary cause as to be in legal contemplation the proximate result thereof (citing cases). Whether the natural connection of events is maintained or broken by the intervention of a new and independent cause is, according to the authorities cited, a question of fact." See, also, *Cornelius v. Hultman*, 44 Neb. 441.

Accepting this as a correct statement of the law upon the subject, it is left for us to inquire whether the evidence disclosed sufficient to justify the submission of the case to the jury. As we have seen, there was enough to justify the jury in finding that defendant by its servants and agents had full knowledge of the habits of Salt creek as to the overflowing of its waters at the place where the embankment was constructed. This, and the question of the negligent construction of the embankment, and that that construction was the cause of the damming up of the water, by which the valley was flooded to the depth named, were questions of fact to be solved by the jury. Assuming, as we must from the verdict, that the jury found these facts in favor of plaintiff, the inquiry would be whether the action of the persons in charge of the relief boat constituted a new and independent cause of the accident, so far disconnected from the original cause as to relieve defendant of liability? As we have seen, the valley was so covered with flood-waters as to render it impossible for the people residing in that part of the city to escape from, or go to, their homes by their usual methods of travel. The only method by which this could be done was in the use

of boats or rafts by which the people could be floated out or in. The decedent, with her mother and other members of the family, had taken refuge on the roof of the porch, having been driven there by the depth of water in the house. The rain was falling during the time they were so situated, and had been so falling during the entire day. They were drenched with water, and, beyond doubt, in a very precarious situation. One of the children was a babe in arms. Acting upon the humane impulse to relieve the distressed and render aid to the suffering, the people more fortunately situated undertook to assist those thus marooned and in danger to places of safety. One of the boats, in charge of two men, one of whom was a special policeman, went, or was sent, to the relief of plaintiff's family. A part of the family, including decedent, were placed in the boat and started for the shore. There is no proof that the boat was overloaded. The mother and others were left on the porch roof to be taken off later. On the way to the shore the boat was cast against or, in some way, struck the obstruction, was capsized, and plaintiff's daughter and the child referred to were drowned. There is no evidence that those in charge of the boat were guilty of any wrongful act or negligence causing the accident. All efforts were directed to the relief of those who had been placed in danger by the increased depth of the flood, found by the jury to have been caused, in part at least, by the negligent construction of the embankment. It is not necessary for us to decide what the effect upon defendant's liability would have been had the rescuers been shown to have been guilty of negligence, for no such negligence is shown. It could hardly be claimed that, where a good faith effort, without negligence, were made to rescue one from a peril wrongfully or negligently caused by another, such effort, if unsuccessful, would relieve the original wrongdoer.

There is an intimation in the evidence, and referred to in defendant's brief, that the men in charge of the boat, which removed decedent from the house, were under the

influence of intoxicating liquor. They were working in the rain and were doubtless very wet. When they came to the house they asked for whisky, but none was given to them. The brother of decedent was standing in the porch in some three feet of water and assisted in transferring a portion of the family to the boat. We quote the following from his testimony: "Q. Your mother was not very willing to trust the children in the boat without being with them? A. Yes, sir. Q. Didn't you say she wanted to go with them? A. Yes, sir. Q. Was Mr. Coburn the other man besides Mr. Hudson? A. I don't know. I heard his name was Heny. Q. Were the boatmen under the influence of liquor? A. That is what they asked for when they were there. Q. They asked for whisky? A. Yes, sir. Q. Did you give it to them. A. No, sir. Q. Did they really get whisky at the house? A. No, sir. Q. What is the reason your mother did not want the children to go with them without being with them? A. That was the reason. Q. They had the appearance of being somewhat under the influence of liquor? A. Not while they were sitting down in the boat. Q. But when they got up? A. Yes, sir. They showed the star, and he said he would send down and get them, and of course we could not do anything else, and they pushed the boat away from the porch and took them anyhow. Q. That is the reason your mother did not want them to take the children without being along? A. Yes, sir. Q. But they did not get any whisky at your house? A. No, sir." The mother did not testify as to the condition of the men, nor give any reason why she desired to accompany her children. Without reference to the competency of the testimony of the son as to the mother's reasons for desiring to enter the boat, we are unable to find any proof that the rescuing men were so intoxicated as to interfere with their effective labors on behalf of the family, if under the influence of liquor at all. There is nothing in this evidence requiring further notice.

It is insisted by defendant that the trial court erred in giving numbers 4, 11, 12 and 13, of the instructions given

to the jury. Instruction numbered 4 is as follows: "The burden of proof in this case is upon the plaintiff to establish all the material allegations of his petition by a preponderance of the evidence, and if you find that the evidence is equally balanced, or that it preponderates in favor of the defendant, then you should find for the defendant. The material allegations of said petition are: (1) That the defendant's railroad improvements complained of in the petition were negligently constructed and caused flood-waters to accumulate at number 228 F street in the city of Lincoln, which would not have accumulated except for such improvements. (2) That in consequence of such diversion and accumulation of said flood-waters the life of Catherine M. Amend was imperiled, and that she was compelled to flee for safety. (3) That her death was caused by the negligence of the defendant in the construction of the embankments and inefficient openings therein, near her home. (4) That her parents have sustained a pecuniary loss by her death." The objection to this instruction is the failure of the court to include, or add to the third clause, the words, "and not by any other intervening efficient force or cause," as requested in number 2 of those asked by defendant. While it may be that the instruction is not open to criticism, as it was given, if standing alone, yet, even if it is not complete, the subject is sufficiently covered in instructions numbered 8 and 10, in which all necessary information upon that part in question was given.

Objection is made to number 11. The consideration of this instruction carried with it the tenth. They are here copied: "Number 10. Where the casual connection between the negligence complained of and the injury inflicted is interrupted by the interposition of an independent human agency, which of itself inflicts the injury, the independent agency, in law, is regarded as superseding the original wrong complained of. In such case, the new intervening cause becomes the proximate cause of the injury, while the original wrong becomes the remote cause

only, and is not actionable. Number 11. It is contended by the defendant that, even though it did negligently, by its railroad grades and embankments, accumulate and divert the waters of Middle creek and Salt creek, and thereby imperil the life and safety of Catherine M. Amend, it would not be liable for her death, because the proximate cause of her death was the overturning of the boat in which she was being conveyed from her home to higher and more elevated ground. But, before you could find that the overturning of the boat was the proximate cause of the death of Catherine M. Amend, you must find that the intervening cause of the overturning of the boat was not procured or produced by the original act of accumulating and diverting the waters of the creeks aforesaid, if you find they were wrongfully and negligently accumulated and diverted. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon the original act complained of, such original act is, in legal contemplation, the primary and proximate cause of the resultant injury." No criticism is made on number 10, but it treats of substantially the same subject as the other. The objection to number 11 is in the use of the words, "it is contended by defendant that," at the beginning, and the words, "before you could find that the overturning of the boat was the proximate cause of the death of Catherine M. Amend," you "must find" that the intervening cause of the overturning of the boat "was not" procured or produced by the original act of accumulating and diverting the waters, etc. As to the first words quoted, it is apparent from the whole record that the instruction stated the contention of defendant correctly. It is claimed that the use of this language tended to discredit the general rule stated in the tenth. It is possible that the proposition might have been stated in other language, but we are unable to detect any prejudice in the phrase adopted. The other clause correctly stated the law. If the construction of the embankment was negligent and "the evidence

Neff v. Brandeis.

discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon the original act," etc., it would be necessary for the jury to find that the overturning of the boat was the independent, intervening, proximate cause of the death.

The twelfth instruction is complained of, but it is not deemed necessary to set it out here, as it is in harmony with the law as stated herein upon the concurrence of the negligent acts of a wrongdoer with the act of God. It need not be further noticed.

The thirteenth instruction is in harmony with our holding in *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, and need not be set out.

The final contention, that the evidence is not sufficient to sustain the verdict and judgment, has been sufficiently noted in the body of this opinion, and the evidence will not be further reviewed.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

ROSE, J., took no part.

ELIZABETH A. NEFF, APPELLEE, V. EMIL BRANDEIS, APPELLANT.

FILED MARCH 12, 1912. No. 16,584.

1. **Master and Servant: INJURY TO THIRD PERSON: LIABILITY.** To sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was, at the time of the accident, engaged in the master's business or pleasure with the master's knowledge and direction.
2. **Torts: NEGLIGENCE: LIABILITY.** The defendant agreed with a third party, for a stated monthly compensation, to take charge of his

Neff v. Brandeis.

automobile, keep it at a garage, wash it, polish it, keep it ready for running at all times, and furnish a chauffeur to the defendant whenever he might desire to use his car. Defendant loaned the car to another, and the keepers of the garage sent it out in charge of their man for the use of the borrower. After such use, and while the chauffeur was returning the car to the garage, he ran into a vehicle driven by the plaintiff and her husband, and injured her. *Held*, That at the time of the accident no such relation of master and servant or of principal and agent existed between the defendant and the chauffeur as would render defendant liable for such injuries.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed*.

Greene, Breckenridge & Matters, for appellant.

W. J. Connell and Walter P. Thomas, contra.

BARNES, J.

Action in the district court for Douglas county by Elizabeth A. Neff against Emil Brandeis and Arthur Brandeis to recover damages alleged to have been sustained by the plaintiff as the result of a collision with an automobile of which Emil Brandeis was the owner. There were two trials in the district court. On the first trial the jury were directed to return a verdict in favor of the defendant Arthur Brandeis, and upon the question of the liability of Emil the jury disagreed. On the second trial the plaintiff had the verdict and judgment, and the defendant Emil Brandeis has appealed.

It appears that in April, 1906, Emil Brandeis was the owner of two automobiles, one of which was called the "White Steamer," which was kept for him by the Powell-Bacon Automobile Company of Omaha, Nebraska, under an agreement which was described by Mr. Powell in substance, as follows: I was to wash the machine, polish it, store it, and keep it ready for running at all times. I was to furnish a man any time Mr. Brandeis might call for it. Mr. Brandeis was to pay me so much a month for

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storing the machine, washing it, keeping it in good shape, and was also to pay me a stated sum for the man. Mr. Brandeis could call on the man—for that man—any time of day or night, and keep him as long as he wanted him. Mr. Brandeis said that he did not want to have the care of a man, to keep his eye on him all the time, and he would prefer to pay me a certain sum per month, with the understanding that I should keep the man at work, but have him subject to his call. I told Mr. Brandeis that I was perfectly willing to do that; that a man would be at his call and disposal at any time he should telephone or give instructions to have him sent out. The defendant corroborated this statement, and further testified as follows: “Q. Who furnished the chauffeur that drove your cars on April 15, 1906, and prior to that time? A. The Powell-Bacon Automobile Company. Q. Did you have some agreement or arrangement under which the chauffeurs were furnished by them? A. Yes, sir. Q. What was it? State what was said as nearly as you can. A. I kept my automobiles at the Powell-Bacon garage. They looked after them in the way of furnishing oil and gasoline, and repairs and extras, and furnishing chauffeurs whenever I wanted to use the cars. Q. How much did you pay? A. \$80 a month.

It appears from the record that on the 15th day of April, 1906, the defendant loaned his automobile to his brother, Mr. Arthur Brandeis; that he did not use or even see his car on that day. Defendant also testified as follows: “Q. Who did use it, if you know? A. My brother. Q. Your brother, which one, A. D.? A. A. D. Q. That is Arthur Brandeis? A. Yes, sir. Q. State whether that car was used at all or out for your personal pleasure or business. A. No, sir. * * * Q. How did your brother Arthur happen to be using this machine on this particular day in question? A. Well, he asked me, I believe it was in the forenoon, whether he could use my car, and I think he said he wanted to go out to his farm; and I said yes, and he telephoned to the Powell-Bacon garage. Q. In other

words, you loaned it to him for that afternoon? A. Yes, sir. Q. You made no use of it yourself, at all? A. No, sir."

With respect to the delivery and return of the machine, Mr. Brandeis further testified: "Why, I had an arrangement at any time I wanted to use either of the cars I would telephone, and they would furnish a man to take me out riding and take the car back to the garage. Q. Who would take the car back? A. The man that ran it—the chauffeur that ran the car. Q. You may state whether or not the driver, Arthur Bell, who drove that car on the afternoon of the day when the collision with Mr. and Mrs. Neff occurred, had to your knowledge ever driven you? A. Why, I did not know Mr. Bell. Q. And had he to your knowledge driven either of your cars before this particular day? A. I would not know that either. Q. State whether or not you had the same chauffeur continuously? A. No, the agreement was that they were to furnish any chauffeur they had there that was at leisure that they could furnish. There was not any particular chauffeur. Q. So you would have sometimes one and sometimes another? A. Yes, sir. * * * Q. You had nothing to do with selecting the particular chauffeur for a particular trip? A. No; I just telephoned them to send the car around." It also appears that the defendant never paid the chauffeur anything, but paid the Powell-Bacon Company for his services, which payment was included in the \$80 per month, as above stated.

It further appears that on the afternoon of the 15th day of April, 1906, the Powell-Bacon Company sent the defendant's automobile out in charge of a chauffeur named Arthur Bell, who testified that, acting upon the order of Mr. Powell, he took the car in question to the home of Arthur Brandeis, and waited there for some time; that Mr. Arthur Brandeis and his family came out, got into the car, and he drove them to Arthur's farm; that upon his return he left them at their home, and started to take the car back to the garage; that on his way there he had a

collision with a vehicle driven by the plaintiff and her husband, which caused the injuries of which she complained.

On cross-examination Mr Powell stated: "I cannot give the exact conversation, but the substance was that I told Mr. Brandeis that he could have the man any time he saw fit, and that the man would be subject to his direction when he left my place. * * * There was something said. I told Mr. Brandeis that he had the direction of the man, and that he was responsible for the man after he left my place." On cross-examination the defendant gave the following testimony: "Q. It was your arrangement with the Powell-Bacon Company that, while he was out in the service with your automobile, running it for you or your friends by your authority, he was doing that for you, was it not? * * * A. I presume so. Q. And he would so continue to run the machine for you and by your authority until he returned the machine to the garage, was not that true? And is not that correct under the arrangements you had with the Powell-Bacon Company? A. It would be if he took the car to the garage after he got through. * * * Q. Then, after he got back to the garage and had delivered it, he would then be out of your direction and no longer subject to it? Is not that correct? A. Yes, Powell might send him out with some other man's car right away. Q. When he came back and returned the machine to the garage then he would no longer be subject to your control, his connection with you then ceased for the time being? A. I suppose so."

The foregoing is the evidence, but not all of it, and about the facts thus established there seems to be no dispute. At the close of the evidence the defendant requested the court to instruct the jury to return a verdict in his favor. His motion was overruled, and that ruling is now assigned as error. It is strenuously contended by counsel that upon the evidence contained in this record there can be no recovery against the defendant. It appears from the pleadings and the evidence that this suit was brought against Emil Brandeis on the theory that

Bell, the chauffeur, was his servant, and it is contended that the facts do not support that theory. It is the well-settled rule that, where one person has sustained an injury from the negligence of another, he must in general proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant, while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained. The master selects the servant, and the servant is subject to his control, and, in respect to the civil remedy, the act of the servant is, in law, regarded as that of the master. But it is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. *King v. New York C. & H. R. R. Co.*, 66 N. Y. 181. In *Wyllie v. Palmer*, 137 N. Y. 248, it was held that the doctrine of *respondet superior* applies only when the relation of the master and servant is shown to exist between the wrongdoer and the person sought to be charged, for the result of some neglect or wrong at the time and in respect to the very transaction out of which the injury arose. *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75; *Doran v. Thomsen*, 74 N. J. Law, 445. In *Lotz v. Hanlon*, 217 Pa. St. 339, the court held that, where plaintiff's suit is to recover for injuries received by being run down by an automobile owned by the defendant, he must show not only that the person in charge of the machine was the defendant's servant, but also that he was at the time engaged on the master's business with the master's knowledge and direction. It was said in the body of the opinion: "But it comes to nothing that the driver was the defendant's servant, if it appears that at the time the accident happened he was not on the master's errand or business."

In *Slaier v. Advance Thresher Co.*, 97 Minn., 305, the supreme court of Minnesota said: "The expression 'in the course of his employment' means, in contemplation of law, 'while engaged in the service of the master,' and nothing more. It is not synonymous with 'during the period covered by his employment.' "

Counsel for the plaintiff vigorously assert that the cross-examination of the defendant and the witness Powell established the relation of principal and agent between the defendant and the chauffeur, and was sufficient to sustain the verdict. This seems to have been the theory upon which the trial court submitted the case to the jury. We are of opinion that the testimony of witnesses on their cross-examination, and upon which plaintiff's counsel rely to sustain the judgment, is not sufficient to render the defendant liable for the negligence of the chauffeur. It did not change the terms of the agreement, as stated by the witnesses on their direct examination. It was nothing more than their opinion of the legal effect of that agreement. As such it was entitled to little, if any, consideration. It must be remembered that the evidence clearly shows that the chauffeur, whose negligence caused the injury of which the plaintiff complains, was the hired servant of the Powell-Bacon Company, and not of the defendant; and where, as in the case at bar, the defendant had not used his car for any purpose, but had merely loaned it to another, and had no control over its movements or the conduct of the chauffeur, we are of opinion that the owner of the car would not be liable for the negligence of the servant of another. Again, it would seem clear, from the evidence, that if the chauffeur, in returning the defendant's car to the garage, had by his negligence injured or wrecked it, the Powell-Bacon Company, whose servant he was, would have been liable to the defendant therefor; and it cannot be said that the chauffeur was his agent to such an extent as to make defendant liable to third persons for the chauffeur's negligence while returning the car to the garage.

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While the legal questions involved in this case have been often decided, it has been difficult to find an adjudicated case where the facts are the same as those in the case at bar. *Parsons v. Wisner*, 113 N. Y. Supp. '922, is perhaps the nearest in point of any of the cases. There the owner of an automobile loaned it to his brother, and the keeper of a garage furnished the chauffeur to run it. The court, in passing on the liability of the owner, said: "Upon the case presented it is established by a clear preponderance of the evidence that the chauffeur in charge of the machine at the time of the accident was not in the employ of the defendant, and had never been in his employ, and that he was not engaged in the business of the defendant, or under his direction or control, at that time." Upon the facts there stated, and for those reasons, a judgment against the owner of the automobile was reversed. It appears that the rule there announced is approved and supported by Babbitt, *Law Applied to Motor Vehicles*, sec. 582; Berry, *Law of Automobiles*, sec. 148; *Cunningham v. Castle*, 127 App. Div. (N. Y.) 580; *Reynolds v. Buck*, 127 Ia. 601. To hold the defendant liable upon the facts of this case, we are required to infer that the chauffeur, whose negligence was the cause of the accident, was at that point of time the servant of the defendant and under his control. We are of opinion that such an inference is too far fetched and is not warranted by the evidence.

For the foregoing reasons, we are unable to sustain the judgment in this case upon either the law of master and servant, or of principal and agent. We are of opinion that the trial court erred in overruling the motion for a directed verdict. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

LEETON, J., concurs in the conclusion.

**PERRY & BEE COMPANY, APPELLEE, v. HOLBROOK OPERA
HOUSE COMPANY, APPELLANT.**

FILED MARCH 12, 1912. No. 17,025.

1. **Corporations: INDEBTEDNESS: LIMITATIONS IN CHARTER.** A corporation, when sued on its promissory note executed in settlement of a debt contracted for materials used in the erection of a building which it was the corporate purpose to construct, at a time when it had contracted no other debts, and had a sufficient amount of money on hand to pay for such materials, cannot defeat a recovery because of a provision contained in its charter limiting the amount of its indebtedness.
2. ———: ———: ———. The fact that by the action of a majority of the stockholders and directors of the corporation it used its funds for purposes other than paying for the materials so purchased affords no legal excuse for its refusal to pay for such materials.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. Affirmed.

W. S. Morlan and J. F. Fults, for appellant.

Perry, Lambe & Butler, contra.

BARNES, J.

Action on a promissory note dated July 8, 1907, for the sum of \$503.74, due in one year from the date thereof, with interest at 8 per cent., given in settlement of an indebtedness due from defendant to plaintiff for lumber and materials used in the erection of defendant's opera house. The execution and delivery of the note was admitted, but defendant alleged want of power to execute it, and plead that by its articles of incorporation it was limited in the amount of its indebtedness to the sum of \$700; that the sum which it owed plaintiff was \$2,503.74, which far exceeded that limit; that the defendant executed a mortgage for the sum of \$2,000, and the proceeds thereof were paid to the plaintiff; that the note in question was

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given to cover the balance of said indebtedness, all of which transactions were void because of the limitations contained in its charter or articles of incorporation. The plaintiff, by its reply, denied the limitation, and alleged that the defendant had amended its charter by a provision increasing its capital stock to \$4,000, and the limit of its indebtedness to \$2,000. The reply also contained allegations creating an estoppel. The cause was tried to the court without the intervention of a jury. Plaintiff had the judgment, and the defendant has appealed.

The bill of exceptions establishes the following facts: In the month of June, 1906, certain persons residing in the village of Holbrook organized the defendant corporation for the purpose of constructing, managing and conducting an opera house in that village. The defendant's charter or articles of incorporation provided, among other things, that the capital stock of the company should be \$3,000, divided into shares of \$10 each; that the indebtedness of the company should not exceed the sum of \$700. and that each stockholder should be entitled to one vote for every share of his stock, and that a majority of the stock represented at any regular or special meeting should constitute a quorum for the transaction of business. About \$2,800 worth of stock was subscribed and paid for, and thereupon a lot was purchased on which to erect a building, which together with the excavating and grading, cost \$250. Plans for the building were procured and adopted, and the lumber and other material for its construction to the amount of \$2,503.74 was thereupon purchased of and furnished by the plaintiff.

The undisputed evidence discloses that at that time the company was not otherwise indebted to any one, and had on hand a sum of money sufficient to pay the plaintiff's claim. It appears, however, that, instead of applying the money then on hand to that purpose, a majority of the directors and stockholders determined to use it for the purpose of seating and heating the building, together with other necessary furnishings, including stage and scenery.

The effect of this proceeding was to defer the payment of plaintiff's claim until about the 1st of May, 1907, when at a meeting of the stockholders, at which there was represented 171 shares of stock, a resolution was adopted increasing the capital stock of the company to \$4,000, and authorizing an indebtedness to the amount of \$2,000; that thereupon the defendant company executed a mortgage upon its property to the bank of Holbrook for the sum of \$2,000, obtained that amount of money thereon and paid it over to the plaintiff. At the same time it was voted to execute the note in suit for the balance of plaintiff's claim, which amounted to \$503.74. This was accordingly done, and the plaintiff received the same in settlement of the indebtedness. It also appears that in August, 1907, the defendant paid to the plaintiff the sum of \$100 upon the note which was indorsed thereon. The record contains no evidence of fraud, and the testimony tends to show that no objection was raised to the proceedings by any of the directors or stockholders until about the time this suit was instituted. Upon the foregoing facts, the district court found generally for the plaintiff and rendered the judgment of which the defendant now complains.

In disposing of defendant's contentions, it is sufficient to say that from a careful reading of the bill of exceptions we are satisfied that the defendant failed to establish any of the several defenses set forth in its answer. It is apparent that at the time the defendant purchased the materials used in the construction of its opera house, and contracted to pay the plaintiff therefor, it was not indebted in any sum whatever, and had a sufficient amount of money in its treasury to pay for the same in full; and the fact that defendant used the funds which had been raised for the payment of the plaintiff's claim for other purposes cannot be successfully urged as a reason for defeating the payment of its just debt.

Finally, it may be said that the defendant lawfully procured the material furnished to it by the plaintiff, has received and retained the benefit thereof, and has estab-

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lished no valid or legal defense upon which it can escape payment for the same.

Therefore, the judgment of the district court was clearly right, and it is .

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. AMERICAN SURETY
COMPANY, APPELLEE.

FILED MARCH 12, 1912. No. 16,559.

1. **Statutes: POWER OF LEGISLATURE: DEFINITION OF TERMS.** It is within the power of the legislature within reasonable limitations to define the terms used in its enactments. It cannot extend the definition of a term so as to denote ideas entirely without its province, but it may properly use the word in the broadest sense and include within its meaning any thought not unwarranted by usage, though perhaps not entirely within its ordinary definition.
2. **Monopolies: CONSPIRACY TO FIX INSURANCE RATES.** By the provisions of chapter 79, laws 1897, commonly known as the "Gondring act," combinations to prevent competition in insurance of any kind, or to settle the price of the same, are declared to be a trust and an unlawful conspiracy against trade and business.
3. ———: ———: "TRADE AND BUSINESS": "TRUST." The words "trade and business" in this act are intended as a generic term embracing all the transactions and practices mentioned in the act, and the term "trust" is properly made to include combinations or contracts in restraint of competition in insurance.
4. **Statutes: CONSTRUCTION: MONOPOLIES.** The entire series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and recourse may be had in considering the intention of the legislature in the later acts to definitions of terms used in prior acts in connection with the same subject matter.
5. ———: **UNLAWFUL COMBINATIONS: SCOPE OF ACT.** Considering the prior legislative definitions, a combination to prevent competition in insurance may properly be a subject for legislation under the title of "An act to protect trade and commerce against unlawful restraints and monopolies," etc. Laws 1905, ch. 162.
6. ———: ———: ———. The purpose of section 4 of that act

requiring certain statements and undertakings to be filed in the office of the attorney general is to aid him in enforcing the statute, and the subject matter of the section falls properly within the scope of the title of the act.

7. **Insurance: FOREIGN CORPORATIONS: STATUTORY PROVISIONS.** Permission granted by former statutes to foreign surety companies to do business in this state, under certain conditions, does not create a contract between such companies and the state, but, even if it did, the state, under its police powers, would still have the right to regulate the business and by additional legislation to require such reports and statements as seemed to it necessary to that end.
8. ———: ———: ———. A state may impose additional conditions on the right of a foreign corporation to do or engage in business within this state, and, unless such additional requirements change or affect those imposed by prior acts of the legislature, the act imposing the additional conditions is not amendatory.
9. **Monopolies: ENFORCEMENT OF STATUTE.** Under the terms of the Junkin act (laws 1905, ch. 162), its administration and enforcement are committed to the attorney general and the governor of the state, and it is made the duty of the attorney general to institute and prosecute such proceedings in any court of competent jurisdiction as may be necessary to carry into effect its provisions.

REHEARING of case reported in 90 Neb. 154. *Former judgment vacated, and judgment of district court reversed.*

LETTON, J.

The former opinion in this case is reported in 90 Neb. 154. The principal contention now made by the attorney general on rehearing is that the provisions of chapter 79, laws 1897, commonly known as the "Gondring act," when considered in connection with the provisions of chapter 162, laws 1905, commonly known as the "Junkin act," made it the duty of the defendant to file the statements and undertakings required by section 4 of the latter act; that these statutes must be considered and construed together, and that, since a combination to prevent competition in insurance is within the definition of a "trust" by the terms of the former act, it was the intention of the

legislature to protect trade from such an unlawful restraint on competition by the latter act, and, consequently, that a foreign insurance company is among those corporations required to make report thereunder.

The defendant insists that the Junkin act is by its title restricted to "trade and commerce;" that insurance does not fall in either of these classes; that insurance is a distinct and separate subject of legislation; that since 1905 the state has not required such reports to be filed and that its right to the same, if one ever existed, has been waived, and it is now estopped to insist upon it; that section 4 is in violation of the constitution; that the penalties imposed by the act are not for failure to file the statements required by section 4; and that if insurance is held to be commerce the act is an attempted regulation of interstate commerce, and therefore void.

At the outset of the discussion it is proper to say that we agree with the defendant that the requirements of section 4 can only apply to such persons or corporations as may reasonably be considered as being embraced within the title of the Junkin act. We adhere to the view expressed in the former opinion that generally the words "trade and commerce" would not include the business of insurance, but we have no doubt that it is within the power of the legislature within reasonable limitations to include within the concept and definition of a term ideas which may not unreasonably be included therein, though perhaps not strictly within its ordinary definition. The line of demarcation between the ideas expressed by the words "trade and business" and "trade and commerce" is somewhat hard to draw, and the legislature may without violence to any constitutional limitations and with propriety embrace within the definition of one term or the other transactions which may lie close to the border line. Statutory definition often relieves the court of questions otherwise hard to solve when endeavoring to ascertain the meaning of the legislature, and is a practice which is to be commended if exercised within proper limitations.

As was said in *In re Pinkney*, 47 Kan. 89, 27 Pac. 179, which was quoted in the former opinion: "While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still, if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title."

Was it the intention of the legislature that the prevention of competition in insurance should be included within the title?

The title of the Gondring act, so far as necessary to consider here, is "An act to define trusts and conspiracies against trade and business, declaring the same unlawful and void, and providing means for the suppression of same." Section 1 of that act, so far as essential here, is as follows: "That a trust is a combination of capital, * * * skill or acts by two or more persons, or by two or more of them for either, any or all of the following purposes: * * * (3) to prevent competition in insurance, either life, fire, accident or any other kind. * * * (5) To make or enter into, carry on or carry out any contract, obligation or agreement of any kind or description * * * by which they shall in any manner establish or settle the price of any article of merchandise, commodity, or of insurance, fire, life or accident, * * * or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale, production or transportation of any such article of merchandise, product or commodity or the carrying on of any such business, that its price might in any manner be affected thereby." By section 2 it is declared: "That any and all acts by any person or persons carrying on, creating, or attempting to create, either directly or indirectly, a trust as defined in section one (1) of this act, are hereby declared to be a conspiracy against trade and business and unlawful," etc. By section 13 of the act it was provided:

"That the word 'person' or 'persons' wherever used in this act shall be deemed to include firm, firms, corporation, corporations, partnerships, copartnerships and associations existing under, permitted or authorized by the laws of the United States, this state or any other state, or the laws of any foreign country or territory of the United States." By this statute, therefore, a combination for the purpose of preventing competition in insurance of any kind is defined as a trust, and a trust is declared to be a conspiracy in restraint of trade and business, and unlawful. Evidently the words "trade and business" are intended as a generic term to embrace all the transactions and practices set forth in the preceding section, and properly include the regulation of insurance contracts in restraint of competition.

At the same session there was passed "An act to prevent combinations between fire insurance companies and providing penalties therefor," commonly known as the "Haller act." Laws 1897, ch. 81. This act prohibited combinations to fix rates and commissions by fire insurance companies, but made no attempt to prevent such combinations to prevent competition in other classes of insurance.

Eight years later the Junkin act was passed. Laws 1905, ch. 162. It was a further development of the legislative campaign against the evils of combinations to enhance prices and to prevent competition in all lines of trade and business. The legislature necessarily must have had in mind the existing statutes on the general subject and the prior definitions of the terms used therein. Our views on this subject are plainly expressed in the opinion in *State v. Omaha Elevator Co.*, 75 Neb. 637, as follows: "We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and that no one act should be singled out for construction and be considered apart from the general trend of legislation upon the subject. * * * It is apparent that the Junkin act of

1905 in a large measure covers the same subject matter as the Gondring act of 1897. Its provisions in some respects are more specific. It is preventive in its nature as well as remedial, and it is apparent that it was intended by the legislature to cover the same subject matter and to furnish like and additional remedies to those provided by the Gondring act. It evidently was intended to be a substitute for that act, in so far as the preventive and remedial features are concerned. It fails, however, to specifically define or construe or determine what a 'trust' is. We think that recourse may be had, however, to the definition of 'trust' in the first section of the Gondring act to throw light upon what the legislature meant when it prohibited 'every' combination in the form of trust' in the Junkin act. The extent of the repeal of the former act is measured by the extent to which it covers the subject matter, and if any portion of the former act is not inconsistent with or repugnant to the latter, and it can fairly be said that it was within the contemplation of the legislature when the later statute was enacted, it will be upheld and construed as forming a part of the later enactment." The legislature in the Junkin act did not again define the words "trust" or "conspiracies against trade and business," for this it had already done in the Gondring act. The title of the new act, so far as pertinent here, is "An act to protect trade and commerce against unlawful restraints and monopolies," etc. By section 1 it is declared: "That every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal."

Since a combination to prevent competition in insurance had already been defined as a trust, it seems evident that the protection of trade from such trust or unlawful combination was within the intent and purpose of the legislature. We are of opinion that the prior legislative definitions made in the Gondring act, to which our attention was not directed upon the argument at the former hearing, when considered in connection with the Junkin

act, bring the case within the rule of *In re Pinkney, supra*. *Beechley v. Mulville*, 102 Ia. 602, and *Queen Ins. Co. v. State*, 86 Tex. 250, cited in the former opinion. Furthermore, we are satisfied that by the passage of the Junkin act it was not the intention of the legislature to narrow the field of the protection given by the Gondring act, and that in both acts the same purpose is manifested, namely, the protection of "trade and business" or "trade and commerce" from unlawful restraints. As used by the legislature in these acts, we think the terms are practically synonymous. In fact, the latter term is, if anything, broader than the former, for, while the terms "trade and business" may have to some extent a somewhat local significance, "trade and commerce" connotes the widest latitude of commercial transactions, interstate or even international in extent. We conclude, therefore, that by prior legislative definition a combination to prevent competition in insurance may properly be a subject for legislation under the title of the Junkin act. The conclusion must follow that the purpose of section 4 in requiring the statements and undertakings therein mentioned to be filed in the office of the attorney general is to furnish that officer with information necessary to aid him in his duty to enforce the law, and that the subject matter of that section falls properly within the scope of the title.

We are not convinced by defendant's argument that by the passage of the Haller act the legislature evidenced the thought that an insurance combination was a separate subject, and therefore not included in the Gondring act. Perhaps this may be true as to fire insurance, but it cannot be so as to other classes of insurance, for they are specifically mentioned in the latter act.

We are not impressed with the contention that section 4 is unconstitutional because it applies to a subject different from the general subject matter of the act. It merely provides a detail the legislature believed to be necessary to carry out the purpose of the law, and, as said before, is clearly within the general scope of the title.

So, also, as to the claim that the act is amendatory of the act of 1885 (laws 1885, ch. 23, Ann. St. 1911, sec. 6711), setting forth the requirements to be met by foreign surety companies as a condition of doing business in this state. True it adds another duty, but it leaves the former act unaffected. The legislature may impose additional conditions if it so desire, but such imposition would not be amendatory, unless the former requirements were changed or affected.

Neither can we agree to the assertion that the permission granted by former acts to such corporations to do business in the state creates a contract which is violated by this act. A license or permission is not a contract; but, even if it were, the state under its police powers would still have the right to regulate the business and to require such reports and statements as seemed necessary to protect its people from unlawful exactions. *State v. Standard Oil Co.*, 61 Neb. 28.

The contention that the state is estopped by reason of the failure of its officers to call for the report for several years, and that thereby the right of the state in this regard has been waived, does not present much difficulty. There is nothing in the record on which this argument can be based. Moreover, no officer is empowered by non-action to repeal mandatory provisions of a statute. It is not infrequent that laws imposing fines and penalties are not enforced, but the penalties are not abrogated thereby nor the laws repealed. If the failure to enforce laws in this country should have the effect of abrogating or repealing them, the bulky and ponderous volumes of both state and federal statutes might easily shrink to pocket size.

The object of this action and the prayer of the petition is that the defendant be enjoined "from further transacting or carrying on its business within the state of Nebraska, and for such other and further relief as equity and justice may require." Defendant contends that the penalties imposed by the act are not imposed for the failure

to file the statements and undertakings required by sections 4 and 5 of the act, but are only imposed for the violation of its provisions with respect to contracts in restraint of competition in buying and selling merchandise and commodities, or in restraint of trade and commerce in the general acceptation of these words. Section 4 (laws 1905, ch. 162) provides, in substance, that no corporation of the class described in the section "shall engage in business within this state, or continue to carry on such business, unless it shall comply with the following conditions:" (Then follows an enumeration of the reports required.) Section 5 provides that the attorney general may at any time require any statement he may think fit in regard to the conduct of the business of such corporation. Section 6 is still broader in its provisions, and makes penal a violation of its terms by "every corporation * * * engaged in business within this state." Section 8 provides, in substance, that all the books of record and papers of every corporation, joint stock company or other association engaged in business within this state shall be subject to inspection by the attorney general and shall make such further returns as shall be by him prescribed. Sections 11 and 16 provide, in substance, that a defaulting corporation may be enjoined against further engaging in such business in this state by a suit brought by the attorney general in behalf of the state, and "that the several courts of record of this state having equity jurisdiction are hereby vested with jurisdiction to prevent and restrain all violations of this act, and especially" the giving or receiving of rebates or concessions.

From a consideration of these sections and of the act as a whole, it is clear that its administration and enforcement is committed to the attorney general and the governor of the state. By section 22 it is expressly provided: "It is hereby made the duty of the attorney general and the county attorneys of the state under direction of the attorney general to institute and prosecute such proceedings as may be necessary to carry into effect all of the pro-

visions of this act." Since the relief prayed for in this action is that a foreign corporation which fails, neglects, and refuses to obey the law as to filing reports be enjoined from continuing to do business in this state, while so violating the provisions of the act, we are of opinion that the petition states a cause of action.

Under the provisions of section 11, the court may enter a modified or conditional decree or a decree to take effect at a future time as justice shall require. It is not obligatory to render a decree in the first instance absolutely barring the defendant from doing business in the state. It is within the power of the court to enter a conditional decree providing that, if the reports and undertakings required by the statute are not filed within a specified time, a final decree may be entered as prayed. Holding these views, the former judgment of the court must be set aside, the judgment of the district court reversed, and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., not sitting.

STATE, EX REL. WILMOT L. BAUGHN, JR., RELATOR, v. WILLIAM G. URE, CITY TREASURER, RESPONDENT.

FILED MARCH 12, 1912. No. 17,501.

1. **Statutes: ENACTMENT: CONSTITUTIONAL PROVISIONS.** Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application.
2. ———: ———: ———. The mere fact that an act of the legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if in other respects it is a complete act in itself.

3. ———: CONSTITUTIONALITY: COMMISSION PLAN OF CITY GOVERNMENT. The provisions of the constitution dividing the powers of government into three distinct departments, legislative, executive, and judicial, and prohibiting any person of one department from exercising the powers belonging to the others, apply to the government of the state, and not to the government of local subdivisions such as municipal corporations; therefore, the Commission Plan of City Government provided for in chapter 24, laws 1911, which permits the exercise of all such powers by certain officers named therein is not invalid as violating such constitutional provisions.
4. ———: ———: ———. Where a law is general and uniform throughout the state, operating alike upon all persons and localities in the same class, it is not open to the objection that it is local or special legislation.
5. ———: ———: ———. There is no requirement in the constitution that the details of local government shall be the same in all cities of like population. Although under the operation of the act allowing the adoption of the Commission Plan of City Government some cities, within the class described in the act, may not adopt the provisions thereof, this does not render the act violative of the constitutional provision that no local or special act shall be passed "changing or amending the charter of any town, city or village."
6. ———: ———: TITLE OF ACT. The provisions of section 11, art. III of the constitution, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," are intended to prevent surreptitious legislation. The court will not be warranted in holding that an act of the legislature is void because more appropriate or a better arrangement of the language in the title might have been adopted, if the general purpose of the act is expressed and the matter contained in the body of the act is germane thereto.
7. ———: VALIDITY. Where a portion of a statute is in violation of the constitution, if the objectionable part was not an inducement to its passage and may be eliminated without interfering with the general purpose of the act, and the remainder of the act is valid and capable of being enforced, the act will be upheld.
8. ———: CONSTITUTIONALITY: ELECTIONS. The provisions of the act in question, that the only candidates "whose names shall be placed upon the official ballot" at the city election shall be those nominated at the preceding primary election, does not prohibit any voter from inserting in such ballot the name of any person for whom he may desire to vote, and does not violate the pro-

visions of the constitution with regard to the freedom of elections.

9. **Officers: LEGISLATIVE CONTROL.** As a general rule offices created by the legislature may be controlled by that body. The term of officers may be shortened, the office abolished, or changes made in the duties to be performed, without thereby violating any constitutional provision.
10. **Statutes: CONSTRUCTION.** A statute of doubtful meaning should be construed, if reasonably possible, so as to carry out the purpose and intention of the legislature, and when this purpose is manifest it will prevail over a seeming conflict in the language. The meaning must be ascertained from a consideration of all that is said in the act upon the same subject matter, and later expressions will usually control the language used in preceding portions of the statute.

ORIGINAL application for a writ of mandamus to compel respondent to accept filing fee, to enable relator to become a candidate for city clerk of the city of Omaha. *Writ denied.*

Isidore Zeigler, for relator.

John P. Breen and John A. Rine, contra.

E. O. Kretsinger, A. M. Morrissey and Meier & Meier, amici curiæ.

LETTON, J.

This is a proceeding in mandamus to compel William G. Ure, as city treasurer of the city of Omaha, to receive from the relator the filing fee of \$5 provided by law to enable him to file his application to have his name placed upon the ballot at the primary election in 1912 as a candidate for the office of city clerk provided for in chapter 12a, Comp. St. 1909, governing cities of the metropolitan class.

Relator alleges his tender and the refusal by respondent of the lawful fee; the reason given being that the office of city clerk is no longer an elective office in said city, and that he as such treasurer had no authority or power

to receive said fee because of the provisions of chapter 24, laws 1911, commonly known as the "Commission Plan of City Government," which act it is alleged was regularly and legally adopted by the electors of that city at a special election and so declared by the duly authorized officers of said city.

Relator in substance alleges that the statute last referred to is in violation of the constitution and void for the following reasons:

(1) Because, although the act purports to be an act complete in itself, it modifies and repeals various prior laws and sections thereof, without naming the same, or in express terms repealing or re-enacting such prior laws and sections. Certain sections in chapter 12a, Comp. St. 1909, being the general law governing cities of the metropolitan class, and also several sections of the general primary election laws of the state are alleged to be amended and repealed by the act, without naming them, which is said to be in violation of section 11, art. III of the constitution.

(2) Because it becomes operative and goes into effect only upon, and not until, the electors of any city desiring to come under its operation and be governed by it vote upon its adoption, and that the legislature thereby has unlawfully attempted to delegate its powers of legislation to that portion of the people of the state adopting said act.

(3) Because whenever the provisions of the law are adopted by any city, then the act becomes special legislation as to the city adopting the same, in that such city is not thereafter governed by the same law as cities of the same class not adopting the act, which result is prohibited by section 15, art. III of the constitution.

The cause is now before us for hearing upon a demurrer to the petition, which, of course, admits all the foregoing facts well pleaded. If the act is void, then it was the duty of respondent to receive the filing fee tendered, and the relator is entitled to the writ; but, if valid, the writ must be refused.

The title of the act under consideration is "An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called the 'Commission Plan of City Government.'" Laws 1911, ch. 24.

The relator concedes that, so far as its title is concerned, this may be deemed an act complete in itself, but it is said that the officers whose election is provided for in the act have to resort to other and prior laws governing the cities in the state adopting the plan to ascertain the powers and duties of the government of such cities, and that for that reason the act is not complete in itself but amendatory; that it does not clothe the officers with power sufficient to govern a city by its own terms, and that consequently, it cannot be said to be an act complete in itself, although the title so indicates. In support of this contention relator cites *Smails v. White*, 4 Neb. 353; *Sovereign v. State*, 7 Neb. 409; *In re House Roll 284*, 31 Neb. 505; *Stricklett v. State*, 31 Neb. 674; *Haverly v. State*, 63 Neb. 83; *German-American Fire Ins. Co. v. City of Minden*, 51 Neb. 870; *Van Horn v. State*, 46 Neb. 62; *City of South Omaha v. Taxpayers' League*, 42 Neb. 671; *Trumble v. Trumble*, 37 Neb. 340; *Board of Education v. Moses*, 51 Neb. 288.

These cases to some extent give countenance to this argument. The law is firmly settled by the later decisions in this state, however, that, where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application. It is pointed out in 1 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 239, that the later cases in this state are in harmony with the current of authority in other jurisdictions. We deem it unnecessary to do more than refer to the following decisions: *Allan v. Kennard*, 81 Neb. 289; *Zimmerman v. Trude*, 80 Neb. 503; *State v. Cornell*, 50 Neb. 526; *Affholder v. State*, 51 Neb.

91; *Van Horn v. State*, 46 Neb. 62; *De France v. Harmer*, 66 Neb. 14; *Wenham v. State*, 65 Neb. 394; *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254; *State v. Moore*, 48 Neb. 870.

In *Smails v. White*, *supra*, the opinion seems to indicate that because the act denounced changed the time in which to file an undertaking on appeal and left the manner of taking the appeal as it was, so that reference was necessary to the former act to ascertain the manner of appealing, this made the law obnoxious to the constitution. This point is considered in *Pacific Express Co. v. Cornell*, 59 Neb. 364, 377, where it is said of the new law: "It but placed the companies, to which it was made applicable, under the supervision of certain officers, cast further duties upon the latter, and for the extent of their jurisdiction or power, and the manner of procedure in its exercise, refers to another law of prior existence. This was not fatally objectionable legislation." Also, in *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, where discussing it, this court said: "Nor is the fact that it refers to another law, making it requisite to follow the requirements of the latter in forming these corporations, a reason why the rule should not prevail. This does not constitute the act so uncertain as to render it difficult to ascertain just what the law is intended to be. The object of the constitution in requiring the portion of the law amended to be included in the new legislation is to preclude the amendment of laws in so blind a manner as to render it difficult to ascertain just what law is intended to be amended." The mere fact that the act requires reference to the existing laws governing cities of the class embraced within this act for matters of detail and administration does not operate to change the character of the act as a complete act. *State v. Junkin*, 87 Neb. 801.

In *People v. Knopf*, 183 Ill. 410, 415, where the validity of a new revenue law was assailed on the ground that the act was amendatory and violated the provisions of the constitution with reference to amendment of statutes, the

court say: "Under all the circumstances the act should be sustained, if possible, as independent legislation, and not as amendatory in character. The mere fact that portions of the old law are left in force, so that the statutes present the aspect of what has been called patch-work legislation, as they undeniably do, should not render the act void, if it can be said that the act is reasonably complete and sufficient in itself upon distinct branches of the general subject." See, also, *People v. Lorillard*, 135 N. Y. 285; *Fornia v. Wayne Circuit Judge*, 140 Mich. 631; *People v. Mahaney*, 13 Mich. 481.

The case last referred to has been repeatedly cited and approved in this court, and we are satisfied with the principles of law therein announced. We think the act under consideration does not violate the constitutional provision respecting the amendment of statutes.

Relator's next contention is that the act in question violates section 1, art. II of the constitution, providing for the distribution of powers for the government of the state into legislative, executive, and judicial. He argues that, since the provisions of the law do not become effective with reference to cities of over 5,000 inhabitants, except on an affirmative vote of the electors thereof, the act is an attempt on the part of the legislature to delegate legislative powers to a municipality; and that, since the legislature is not authorized to submit to a popular vote of the state the question whether or not an act proposed by it shall become a law, it cannot submit such a question to the electors of a municipality; that by the act the choice of selecting two different forms of government is left to the electors of each city, which choice the legislature has not the power or the right to delegate to the electors of a municipality.

The provision of the constitution referred to by its express terms is concerned only with the government of the state, and does not attempt to limit the legislature as to its power to prescribe the manner in which municipalities or local subdivisions of the state may administer their

local affairs. The constitution committed to the legislature the general power to create, regulate and govern such municipalities and the authority to pass laws providing all the administrative details necessary, except as to a few matters where such powers are expressly limited by its terms. This question has been raised, considered at length, and decided in a number of recent cases in other states where similar acts have been passed, and courts in general have taken the same view. We believe it only necessary to refer to the reasoning in these opinions on this point. *Eckerson v. City of Des Moines*, 137 Ia. 452; *Cole v. Dorr*, 80 Kan. 251; *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

On the general subject of the powers of the legislature to submit to electors of a local subdivision of the state the question whether they shall adopt or reject, as applying to such subdivisions, the provisions of a general law, many cases are cited in 8 Cyc. 840, note 17. In this state, so far as has been brought to our attention, the right of the citizens of a county to vote upon the division of the same, or to vote upon the adoption of the "Herd law," or upon the question as to whether bounties should be paid by the county for the killing of wild animals, has never been questioned. We conclude, therefore, that it was within the power of the legislature by general law to allow the electors of all cities in the same class to adopt or reject the commission plan of government.

It is next contended that the act is unconstitutional for the reason that it is a local and special law, and thereby violates section 15, art. III of the constitution; that, if the electors of one municipality should adopt the commission form of government and other cities of the same class should refuse to adopt that form, the electors would be permitted to do that which the legislature is prohibited from doing, and that thereby various forms of government for municipalities belonging to the same class are made possible. We think the act is not inimical to the constitution for this reason. It is a general act applying to all

cities within the state of over 5,000 inhabitants and operates on all cities alike within the class. It affords to each city within its terms opportunity to select its system of government. The mere fact that the ultimate result may be that some cities of the state may have a different form of government from others does not necessarily make this a special or local law.

In *In re Pctition of Cleveland*, 52 N. J. Law, 188, 7 L. R. A. 431, the facts were that an act of the legislature of New Jersey vested in the respective mayors of the cities of the state the power to appoint certain municipal officers in substitution for certain previously existing methods of appointment, and the law was made operative only in cities which elected to accept its provisions. The city of Jersey City accepted the provisions of the act and the mayor thereupon filled the municipal offices. Prior incumbents contested the validity of the statute, among other grounds, for the reason that the act was special and local. The language of the court is so apt that we quote it: "The alleged vice in the law, mainly relied upon to overthrow it, is that it is local and special, and therefore proscribed by our constitutional provision. In this argument it is an obvious and fundamental fact, which must be ever present in mind, if we would not be misled, that the grant of the powers of local government inevitably leads to diversity. The object of delegating powers is to enable local governments to make such diverse laws as they may deem expedient. The grant of such powers implies that diversity is requisite. If uniformity was to be preserved, the legislature would establish an inflexible and uniform code for all localities, leaving nothing optional. If we hold that the fact that diversity arises out of the use or application of a legislative act is destructive of its validity, we must affirm that the constitution of our state, in its present form, absolutely forbids the delegation of powers of local government. Such a proposition, I think, no one will seriously advocate. Uniformity in results cannot co-exist with the right of local self-government until all men

shall be of one mind. No one will assert that an act is local or special which gives to all the cities of this state the right to establish by ordinance the mode in which their subordinate officers shall be elected. Under such a statute, one city might make the tenure of office a term of years, another during good behaviour, and a third, at the will of the common council. Such diverse results in the execution of the granted power obviously could not outlaw the act of the legislature. The authority granted to all is the same; the dissimilarity is in its use—a dissimilarity inherent in the idea of local government. The uniformity exacted by the constitutional mandate must be sought for, not in the results which flow from the free, unhampered exercise of the granted power of local government, but in the fact that every locality is afforded a like right to adopt and exercise in its own way the same powers which are bestowed upon every other like political body. To the one no privilege must be offered for acceptance which is not extended to the other. The authority given must be the same; it may be executed in a different way, or in the same way, at the option of the recipient. That is the uniformity to which the judicial declarations in the adjudged cases in this state must be referred.” See, also, *State v. Holmes*, 68 N. J. Law, 192, 53 Atl. 76. The same question is treated of at length in the leading case of *Eckerson v. City of Des Moines*, *supra*, where it is held: “The fact that it is possible, or even probable, that some one or more cities may not avail themselves of the provisions of an act granting special powers to the class of cities to which they belong will not affect the uniform application of the law if all who do accept it are to be governed alike. A law which is a complete enactment when it leaves the legislative department is not objectionable as a delegation of the legislative power, because containing a provision that it shall not become operative except upon a vote of the people to whom it is made applicable.”

The principles announced and discussed in these decisions are the same as those announced by this court in

Allan v. Kennard, 81 Neb. 289. In that case it is said: "It is settled law in this state, as well as in most others having like constitutional restrictions, that where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not open to the objection that it is local or special legislation (*State v. Graham*, 16 Neb. 74; *State v. Berka*, 20 Neb. 375; *Van Horn v. State*, 46 Neb. 62; *Livingston L. & B. Ass'n v. Drummond*, 49 Neb. 200), and it is unnecessary to do more than state the principle in this connection. See, also, *State v. Frank*, 61 Neb. 679." See, also, *Cole v. Dorr*, 80 Kan. 251; 1 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 201, and cases cited.

There is no requirement in the constitution that the details of local government shall be the same in all cities of like population. Cities in the same class so far as population is concerned may and often do have quite different methods of local government in some details of administration. That which is illegal in one city may be legal in another, depending upon the different ordinances in effect. Moreover, in classification by population the line of differentiation is almost imperceptible. What essential difference is there to justify placing a city of 10,000 inhabitants in one class and a city of 9,999 inhabitants in another? The real difference becomes obvious only as each city recedes in population from the dividing line, yet, it cannot be successfully contended that acts making classification on such a basis are local or special in their nature.

The remaining objections urged by the relator are answered in the opinions in the cases cited and will not be further considered.

A brief, however, has been filed by counsel appearing as friends of the court, suggesting certain other provisions which it is claimed render the statute unconstitutional. The title of the act is "An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called

the 'Commission Plan of City Government.' " It is argued that since the title shows that the act can only apply to cities having 5,000 population, according to the national census of 1910, cities hereafter reaching 5,000 population are not within its terms, which, under the doctrine of *State v. Scott*, 70 Neb. 685, is a violation of section 15, art. III of the constitution. The operation of the act condemned in *State v. Scott*, *supra*, was, by its terms, limited to counties having a population of 50,000 according to the census of 1900. There were only two counties in the state coming within the class. It was held that, since the act could never apply to any other counties, it was local and special in a matter which the constitution required to be general. By the terms of section 1 of the act under consideration, it is provided that "any city in this state *now or hereafter* having, according to the last officially taken and promulgated state or national census, five thousand or more population, may adopt the provisions of this act," etc., so that the act is not subject to the vice pointed out in the *Scott* case.

It is contended, however, that section 1, in so far as it refers to any census taken hereafter, is void, for the reason that this portion of the act is broader than its title. We are not inclined to take such a narrow view. The title may be said to be ambiguous to a slight extent, but the section immediately following is specific. The title may reasonably be held to apply to cities having, at the time they vote on the adoption of the act, 5,000 population, according to the last preceding census. A title is not expected to specify minutely all the provisions of the act. In *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, it is said: "It is not essential that the title chosen by the legislature be the most appropriate; if it indicates the scope and purpose of the act, it is sufficient. *State v. Bemis*, 45 Neb. 724; *In re White*, 33 Neb. 812. Neither is it necessary that the title inform its readers of the specific contents of the bill. If it indicates the subject of the proposed legislation, it meets all essential requirements. It

needs not that it be a complete abstract and epitome of the contents of the bill. If no portion of the bill is foreign to the subject of legislation, as indicated by the title, however general the latter may be, it is in harmony with the constitutional mandate. *Boggs v. Washington County*, 10 Neb. 297; *Hopkins v. Scott*, 38 Neb. 661; *State v. Moore*, 48 Neb. 870." The provision of section 11, art. III of the constitution, should not be given such a narrow and technical construction as to require the title to contain an index to or abstract of the provisions of the bill. *Alperson v. Whalen*, 74 Neb. 680; 3 Neb. Syn. Digest, secs. 132-136, p. 2968. Unless the purpose of the constitution makers to prevent surreptitious legislation has been thwarted, the court will not be warranted in holding that an act of the legislature is void because a better title might have been adopted.

It is next suggested that section 17 of the act violates the provision of the Bill of Rights relative to freedom of speech. Even if this be true and the section is void for that reason, it can be eliminated without affecting in any degree the remainder of the act. It could not have been an inducement to its passage. The views of this court as to the meaning of section 5, art I of the constitution, have been fully expressed in the majority opinion and in the dissenting opinion of the writer in *State v. Junkin*, 85 Neb. 1, 10, and it is unnecessary to repeat them.

Objection is made to sections 5, 7 and 8, with reference to the manner of printing the official ballot, and it is said that these provisions are in violation of the constitutional provision that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const., art. I, sec. 22. We do not understand that the act prohibits or prevents any voter from writing the name of any candidate upon the ballot, either at the primary or general election. In fact, as to the primary, it is provided, after stating in what manner the names of candidates shall be placed on the ballot: "In all other respects the general

character of the paper ballot to be used shall be the same as authorized by the 'Australian Ballot Law' of the state." (Sec. 6.) And, as to the city election, it is provided: "In all other respects the general laws in force in any such city respecting the holding and conducting and declaring the result of any such regular or general city election shall apply, so far as the same are applicable and not inconsistent with the provisions of this act." (Sec. 8.) We understand the provision that the only candidates "whose names shall be placed upon the official ballot" (sec. 7) at the city election means that these are the only candidates whose names shall be printed on the official ballot, and we find no prohibition against any voter inserting the names of such other persons as he may desire to vote for.

It is also objected that section 21, which provides for the removal of any incumbent of the office of councilman by means of an election held upon a petition filed by a specified number of voters, is amendatory of prior statutes. It will be observed that the "councilman" who is subject to removal under the provisions of this section is the officer who is provided for by the terms of this act, and that this section does not apply to the holder of any municipal office created by any other statute. Since section 21 does not affect or modify the provisions of prior statutes, it cannot be said to be amendatory of them. In any event, the recall provisions of this section may be eliminated and still the main provisions of the act remain effective, since it cannot have been one of the main inducements to the passage of the act. If the occasion ever arises for a direct attack upon it, and it is pointed out that for other reasons this section violates any of the provisions of the constitution, the court, even though we hold the act is valid, may still consider whether for any reason this section is vulnerable to attack. It may be said, however, that as a general rule offices created by the legislature may be controlled by that body, that the term of officers may be shortened, the office abolished, or changes made in the duties to be performed, without violation to any constitutional provision.

It is also contended that since it is provided, in substance, in section 19, that all general state laws governing the several classes of cities described in the act which are inconsistent with the provisions of this act shall, upon its adoption by any city and the election of officers thereunder, be deemed and held to be repealed, and, in section 24, that any city which shall have operated for more than four years under the provisions of the act may abandon its provisions and organization thereunder, and accept the provisions of the general law of the state then applicable to such cities by a majority vote at a special election, these provisions are inconsistent with each other; that, if under the provisions of section 19 the general statutes are repealed with respect to such cities, they cannot again be revived and made applicable under the provisions of section 24. Perhaps it is unnecessary to anticipate the contingency that a city which has adopted the commission plan of government will ever desire to return to a government under the general laws of the state, but we see no difficulty in construing these two sections. It is evident that the legislature intended that the operation of the general laws should be abrogated or suspended so long as the municipality elected to proceed under the commission form and that an absolute repeal was not intended. In construing a statute of doubtful meaning, the rule is to do so, if reasonably possible, so as to carry out the purpose of the legislature, and when this purpose and intention is manifest it will prevail over a seeming conflict in the language. *Flagg v. Flagg*, 39 Neb. 229; *Parker v. Nothomb*, 65 Neb. 315. The meaning must be ascertained from a consideration of all that is said in the act upon the same subject matter. Moreover, since the latter provisions clearly show that it was the intention of the legislature that cities might again resume the former method of government, the rule applies that where different portions of the same statute conflict the last words stand. *Van Horn v. State*, 46 Neb. 62.

At the oral argument it was further contended that the

provisions of section 11, vesting in the council "all executive or legislative or judicial powers and duties hitherto held, possessed or exercised under the then existing laws governing any such city, by the mayor or mayor and city council or water commissioners," etc., and providing that such powers, duties, and office shall thereupon cease and determine, also violates the provisions of the constitution. This section, however, expressly excepts from its operation any office or officer in the city named in the state constitution, and city school or school district officers. As we have seen, the legislature is not restricted by the constitution with regard to the creation or termination of municipal offices, and it may provide that the duties heretofore exercised by certain officers may be exercised by others. It is, therefore, within its powers to so enact.

We have not found it necessary to elaborate by an extended course of reasoning the principal grounds upon which our decision rests. The act is, in the features attacked, very similar to the statute of the state of Iowa, which was construed by the supreme court of that state in *Eckerson v. City of Des Moines*, *supra*, and, while we cannot, for the reason that this act is not identical in several respects with the Iowa act, apply the rule that, where the legislature adopts the statute of another state, the judicial construction which it has already received in such state is also adopted, much of the extended discussion of principles found in the opinion in that case is applicable. So, also, with those stated in *Bryan v. Voss*, *supra*; *Cole v. Dorr*, *supra*; *Cole v. Tucker*, 164 Mass. 486; *Graham v. Roberts*, 200 Mass. 152; *Orrick v. City of Ft. Worth*, 52 Tex. Civ. App. 308, 114 S. W. 677; *In re Pfahler*, 150 Cal. 71, 88 Pac. 270.

As a whole, the act does not seem to us to be subject to the objections urged, and the respondent was justified in refusing to accept the filing fee. The writ of mandamus is

REFUSED.

REESE, C. J., not sitting.

CATHERINE KRAMER, APPELLEE, v. JOHN A. WEIGAND,
APPELLANT.

FILED MARCH 12, 1912. No. 16,638.

1. **Limitation of Actions:** TRESPASS UPON THE PERSON. Section 13 of the code, providing that a civil suit for assault and battery must be commenced within a year from the time the cause of action accrues, does not apply to an action for trespass upon the person of plaintiff, resulting in her pregnancy and in the subsequent birth of a bastard child.
2. **Assault and Battery:** WEIGHT OF EVIDENCE: QUESTION FOR JURY. In a civil action for such a trespass, the weight of evidence that plaintiff made no outcry when assaulted, and that for a time she did not complain of the assault, is for the jury, where her testimony tends to show that she resisted defendant to the extent of her ability.
3. **Evidence:** ASSAULT. The rule that, in a civil action, a preponderance of the evidence proves any issue, applies to a civil action for such a trespass.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

H. C. Vail, for appellant.

A. E. Garten, William R. Patrick and O. M. Needham,
contra.

ROSE, J.

Plaintiff is an unmarried woman, and this is an action for trespass upon her person. In her petition she charges defendant with forcible debauchment, resulting in her pregnancy and in the subsequent birth of a bastard child. From a judgment in her favor for \$5,000 defendant has appealed, relying upon the following points for a reversal: (1) The action is one for damages for assault and battery and is barred by the statute of limitations, because it was not commenced within a year from the time it accrued. (2) The evidence is insufficient to prove that plaintiff did

not consent to the acts of defendant, and for that reason does not sustain the verdict. (3) The damages are excessive.

1. If the suit is merely a civil action for damages resulting from assault and battery alone, it is barred, because it was not commenced within a year from the time the cause of action accrued, as required by section 13 of the code. The nature of the action therefore determines the first question. In the petition it is alleged: "That on the 15th day of September, 1907, at Petersburg, in the county aforesaid (Boone), the defendant with force and violence made indecent assault upon the plaintiff, and violently laid his hands upon her and her the said plaintiff then and there overcame and then and there wickedly defiled, debauched and carnally knew her, whereby she became sick and pregnant with child, and so remained for a long space of time, to wit, for the space of about nine months; at the expiration of which time, and on the 8th day of July, 1908. she was delivered of the child of which she was so pregnant." Defendant argues that those allegations charge assault and battery and that the action was brought to recover damages therefor. While the acts of which complaint is made include the elements of assault and battery, they are not limited thereto. They charge a wrong against the sex which is not generally classified, either in criminal law or in civil procedure, as "assault and battery." Plaintiff's injury extends beyond the common understanding of those words as used in the statute. According to the petition defendant overpowered her and violently invaded her organs of generation. As a result she must involuntarily bear the suffering and the shame of his trespass and the burden of his illegitimate offspring. His violence will follow her as long as she lives, and may, through the means of reproduction, connect her by her ravisher's blood with the immortality of human life. This was not the kind of trespass the legislature had in mind when the words "assault and battery" were used in the statute of limitations. Plaintiff's action is more like one to re-

cover damages for rape than for assault and battery. In criminal law the two offenses are different, though the elements of assault and battery are included in the graver offense of rape. A prosecution for one must be commenced within three years, and for the other within one year. Criminal code, secs. 12, 17, 256. The statute of limitations applicable to civil actions seems to make a similar distinction. Section 13 of the code specifically mentions assault and battery, and provides that a suit therefor must be commenced within a year from the time the cause of action accrues. In limiting the time for commencing civil actions, the statute does not refer directly to actions for rape, but section 12 of the code provides that an action for an injury to the rights of plaintiff, not arising on contract and not subsequently enumerated, must be commenced within four years from the time it accrues. The latter provision rather than section 13 applies to this case. The distinction here made seems to have been recognized at common law. Damages for assault and battery were recoverable in a civil action, but damages for rape were not, and where rape was part of the violence proved there could be no recovery for assault and battery. *Desborough v. Homes*, 1 Fost. & Fin. (Eng.) 6; *Wellock v. Constantine*, 9 Jurist, pt. 1 n. s. (Eng.) 232. The distinction is illustrated in the latter case, wherein the facts are strikingly like those in the case at bar. This difference between the nature of the offenses was evidently observed by the legislature when the statute of limitations was enacted. The trial court properly held that this is not a civil action for assault and battery, and that therefore it is not barred by the statute of limitations.

2. Should the trial court upon a consideration of all of the evidence have said as a matter of law that it was insufficient to sustain a verdict in favor of plaintiff? Did plaintiff consent to the unlawful conduct of which she complains? If she did, she of course participated in the wrong and cannot recover in this action. Defendant was a married man about 45 years old. His family consisted

of his wife and five children. They lived on a farm near Petersburg. Plaintiff had been an orphan since childhood, and at the time of her ravishment was about 23 years of age. She had been living in the home of defendant about three years. She was a servant, but was treated as a member of the family and attended church with them. She testified to these facts: Plaintiff, defendant, the hired man, and one of the children returned from church in the evening before 9 o'clock, September 15, 1907, when defendant's wife was away from home. Shortly afterward plaintiff was in the dining room. The others soon retired, with the exception of defendant, who assaulted her and pulled her into his lap. In a few minutes he attempted to drag her through a doorway into an adjoining bedroom. She caught hold of the doorframe, but was forced through the door into the bedroom and thrown on the bed. He tore her drawers and ravished her. She testified that she resisted his advances to the extent of her ability. She admitted, however, that she made no outcry, though the hired man and a son of defendant were upstairs, and that she did not tell any one about the assault for several weeks. She further testified that the trespass was forcibly repeated in absence of defendant's wife. The evidence shows that a jury in a bastardy case found that defendant was the father of plaintiff's child. The judgment of filiation was affirmed by this court. *Kramer v. Weigand*, 88 Neb. 392. A witness for plaintiff testified he had heard defendant say in a saloon that the latter had sexual intercourse with plaintiff. Defendant denied the assault and any undue intimacy with plaintiff, but, without the inference to be drawn from such testimony, her proof of resistance is uncontradicted.

Defendant argues that the weakness of the proof of resistance, the failure to make an outcry and plaintiff's secrecy, when considered with all the circumstances, show conclusively that plaintiff consented to defendant's acts. In her testimony she explained that she did not think to make an outcry and that she was ashamed to tell what had

taken place. While these are circumstances which the jury should consider on the issue of resistance, they are not conclusive evidence of plaintiff's consent. When first attacked, she was in the dining room where she owed obedience to all proper directions of defendant. He was nearly twice her age. She had lived in his home nearly three years, and would naturally feel that she would receive his protection there. When confronted under such circumstances by a sudden and unexpected assault and seized by a fear of being discovered in a disgraceful situation, a virtuous woman, before making an outcry, might trust to her powers of resistance until it was too late, and even conceal the outrage in the hope of escaping exposure. It is well-settled law that the weight of evidence showing a failure to make an outcry or to complain of an assault are questions for the jury in a civil action. *Starnes v. Stevenson*, 98 N. W. (Ia.) 312; *Witzka v. Moudry*, 83 Minn. 78; *Linville v. Green*, 125 Mo. App. 289; *Dean v. Raplee*, 145 N. Y. 319. This court has often announced the rule that in a civil action a preponderance of the evidence proves any issue. *First Nat. Bank v. Goodman*, 55 Neb. 409; *Davidson v. Davidson*, 70 Neb. 584; *Link v. Campbell*, 72 Neb. 307; *Search v. Miller*, 9 Neb. 26. This principle is applicable to the present case, and the evidence outlined is sufficient to sustain the judgment. *Schenk v. Dunkelw*, 70 Mich. 89; *Rogers v. Winch*, 76 Ia. 546; *Beseler v. Stephani*, 71 Ill. 400; *Dean v. Raplee*, 145 N. Y. 319; *Dickey v. McDonnell*, 41 Ill. 62.

3. No sufficient reason for setting aside the verdict as excessive has been suggested, and none has been found in the record. It follows that the judgment must be

AFFIRMED.

BEDILIA WARD, APPELLEE, v. ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED MARCH 12, 1912. No. 17,234.

1. **Appeal:** EVIDENCE. The conjectural opinion of an expert, based solely on a hypothetical question not submitting all of the material facts, is insufficient to sustain a verdict.
2. **Trial:** DIRECTING VERDICT. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error for the trial court to overrule a motion for a peremptory instruction in favor of defendant.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed with directions.*

Greene & Breckenridge, for appellant.

John M. Macfarland and Weaver & Giller, contra.

ROSE, J.

This is an action to recover \$1,500 on a policy of accident insurance issued by defendant December 1, 1904, to Frank Ward, a locomotive fireman in the employ of the Union Pacific Railroad Company. Plaintiff is the mother of assured and was named in the policy as beneficiary in the event of his death by accident. He was injured August 1, 1905, and died August 17, 1905. According to the petition, injuries to his left foot and left side and internal injuries received August 1, 1905, when he was engaged in the duties of the employment described, resulted in his death. In the answer defendant denied that assured came to his death as the result of any accidental injury. From a judgment on the verdict of a jury for the full amount of plaintiff's claim, defendant has appealed.

This is the fourth appeal by defendant in this case. The former opinions are reported in *Ward v. Ætina Life Ins. Co.*, 82 Neb. 499, 85 Neb. 471, 87 Neb. 724. While acting as fireman, assured's left foot was injured August

1, 1905, and it was promptly dressed by his employer's surgeon. About ten days later the latter certified that assured was able to return to his work, and he did so August 15, 1905, attempting to fire an engine running from Omaha to Grand Island. He did the firing until he arrived at Central City. During the remainder of the run he was sick and unable to work, and was taken to a hospital at Grand Island, where he died a few hours later. The weather was warm, and he told the nurse he drank ice water and that he was taken suddenly with cramps and vomiting, but made no reference to his previous injuries. The physician who attended him at the hospital testified he died of heat exhaustion. The substance of the evidence relating to assured's injuries and to his subsequent sickness is stated more fully in the opinion delivered on the third appeal. 87 Neb. 724. At the fourth trial the evidence varied from that adduced at the third in this respect: The testimony of Dr. Walker, who gave his opinion as an expert, was eliminated, and Dr. Connell testified for the first time in that capacity. It is the law of the case that plaintiff is not entitled to a recovery on the insurance contract without proving that "the accident was the sole cause of the death of the insured independent of all other causes." It was also held that the evidence at the third trial was insufficient to support a verdict in favor of plaintiff. 87 Neb. 724.

The controlling question now is: Does the additional testimony of Dr. Connell, in place of that of Dr. Walker, contain evidence to support the verdict that the accident was the sole cause of assured's death independent of all other causes? The proof relating to the nature and extent of assured's injuries is very meager, but the record shows, as already stated, that the surgeon who dressed the injured foot certified that assured was able to return to his work in about ten days after the injury. The weather was warm, and the physician who attended him in his last illness gave "heat exhaustion" as the cause of his death. When in the hospital assured told his nurse

that he drank ice water and that he was taken with cramps and vomiting, but said nothing about the injuries to his foot and side. In this condition of the evidence Dr. Connell was called as an expert. He had never seen assured and personally knew no fact in connection with his injuries or with his last illness, but was asked this question: "Doctor, I want to submit to you a hypothetical question, and get your opinion on the question, and I will state it in detail: Assuming, doctor, that a young man 22 years of age in good health, on the 1st day of August, 1905, received an injury on an engine by having his foot crushed and bruised between the apron and the cab of said engine, and assuming that he was thereupon compelled to quit work and remain about his home for a period of two weeks, and assuming that within three hours after receiving said injuries he complained of pain in the left side reaching down to the groin, and assuming, further, that he continued to limp in said left foot for said two weeks, and assuming that he complained of pain in his left side many times during said two weeks, and assuming further that he stated to his relatives on the 15th day of August, 1905, just before taking his run from Omaha to Grand Island as fireman, that he was not strong enough to go out, and assuming that he fired the engine for 15 hours out as far as Central City, and that just before reaching Central City he drank some water and thereupon became sick and vomited, and assuming that he remained upon the train for two hours after reaching Grand Island, and that within 48 hours after reaching Grand Island he died, what in your opinion was the primary cause of his death?" This was answered by the expert as follows: "From the facts stated here, and not knowing anything about his condition in the 48 hours that he was sick, or the last 48 hours he was alive not being given, my opinion is that the primary cause of death would be from the injury." Some of the conditions, symptoms and other evidential facts disclosed by the record were not included in the hypothetical question, and

the answer therefore was not an opinion based on all of the evidence. On cross-examination the witness said his answer might be affected by assured's symptoms during the last 48 hours of his life, if the witness knew what they were. When asked what would produce the symptoms preceding assured's death, as restated from the proofs, by counsel for defendant, the witness replied that they could be produced by an "embolism"—a term described by him as follows: "I mean a clot of blood in the artery or vein at the seat of the injury, and it becoming loosened and traveling through the circulation until it would become lodged in some portion of the circulation until it would produce the symptoms you have described." He also stated that it would be necessary to see the patient before testifying that such symptoms were caused by an embolism, but that on the hypothetical question he would say it could be the cause; that he wouldn't undertake to say the death of assured was produced by an embolism; that he was not sufficiently informed to pass judgment on that question; that he wouldn't swear to what caused assured's death, but from the hypothetical question alone his opinion was that he died from an embolism due to an injury; and that the cause of the death was a matter of speculation. In answer to the question, "And if it were true that he had cramps, nausea and vomiting as the result of drinking large quantities of cold water on a hot day, that would have something to do with the cause of his death, might it not?" he answered: "If it was due to the water; yes, sir." When all of the testimony of this expert is considered, it amounts to no more than the expression of an opinion, in answer to a hypothetical question not submitting all of the facts, that the death of assured could have resulted from his injuries of August 1, 1905, and that the drinking of cold water might have had something to do with it. In the light of the entire record, the opinion is mere speculation and conjecture, and, in connection with the facts proved, is wholly insufficient to sustain a verdict that the accident was the

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sole cause of assured's death independent of all other causes. At the close of the testimony defendant requested a peremptory instruction, which should have been given. Plaintiff having repeatedly failed to establish by a preponderance of the evidence the controverted fact essential to a recovery, the cause will not be remanded for a new trial. Instead, the judgment is reversed and the cause remanded, with directions to the district court to dismiss the action.

REVERSED.

D. C. PATTERSON, TRUSTEE, APPELLANT, V. CHARLES E. REITER, APPELLEE.

FILED MARCH 12, 1912. No. 16,629.

1. **Taxation: JUDGMENT: RULE OF PROPERTY.** *Ambler v. Patterson*, 80 Neb. 570, 575, adhered to, and *held* to have established a rule of property in Nebraska upon the questions therein decided.
2. **Quieting Title: PLEADING.** The pleadings set out in the opinion examined as a whole, and *held* properly construed by the trial court and sufficient to support the judgment entered thereon.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

D. C. Patterson, pro se.

Thomas W. Blackburn, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county to quiet his title to lot 7, in block 4, in Thornburg, and to lots 6 and 7, in block 6, in West Cuming; both designated as additions to the city of Omaha. The petition alleges that plaintiff acquired title to the lots in controversy by deeds from the county treasurer of Douglas county; that said deeds were founded upon and executed

in pursuance of proceedings in the district court for Douglas county in a state tax suit for the year 1904; that the proceedings from the commencement of said tax suit to and including the execution of the deeds were in all respects regular and valid; that the district court had jurisdiction of the suit and of all persons and corporations having any right, title, claim or interest in the lots described; that by virtue of said proceedings and deeds plaintiff acquired and now has a valid and indefeasible title in fee simple to all of the lots. The petition then sets out the names of the persons who, by the records in the register of deeds' office of Douglas county, appeared, during all of the proceedings in the suit referred to, to be the owners of the lots described, and alleges that, since plaintiff acquired the title and possession of the lots, such owners have conveyed the same by quitclaim deeds to the defendant. The prayer is that the plaintiff be adjudged the owner in fee simple of all of the lands described and that his title may be quieted.

The answer denies all allegations in the petition not specifically admitted; admits the ownership at the time of the commencement of said tax suit of the parties named in plaintiff's petition and the conveyance by said parties of the lots in controversy to the defendant; alleges that on behalf of the parties of whom he purchased, and of himself, defendant offered to pay plaintiff all sums of money paid by plaintiff to the county of Douglas or to any of its officers or to any other person, in and about the proceedings connected with the said case, with 7 per cent. interest, but that plaintiff refused to consider any proposition whatever except such sums as plaintiff claimed would be necessary to redeem said lots from taxes; and that plaintiff informed defendant that he would not consider any tender of any less sum; that the property was sold at tax sale to plaintiff, stating the amounts which plaintiff paid as such purchaser; that the deeds executed by the county treasurer to plaintiff were, at the time they were issued, and at all times since have

been null and void, for the reason that, prior to the execution of the tax deed, no notice of the expiration of the time of redemption from the tax sale and no final notice, as provided in section 33, ch. 75, laws 1903, under which said property was sold, notifying defendant's grantors of the time when said real estate was sold, or the time when the period of redemption from such sale would expire, were served; that the only notice claimed to have been served upon said parties was a final notice claimed to have been published and served by publication; that said printed notice did not comply with the law as appears upon the face thereof, in that the so-called final notice was what is termed a blanket notice, covering a large number of lots and tracts of land owned by different persons. For further answer, and by way of cross-petition, defendant offered to pay to plaintiff the sums which he had paid on account of the purchase of said lots, together with 7 per cent. interest; alleges that defendant is the owner of the lots described, and that plaintiff's claim is a cloud upon his title; concluding with a prayer that the alleged title set up in plaintiff's petition be declared null and void; that the deeds of the county treasurer to plaintiff be declared null and void and canceled of record as against the property in controversy; that the court take an account and ascertain the amount actually paid in and about the proceedings whereby the pretended deeds from the county treasurer were obtained by plaintiff, with interest on said total sum; and that a decree be entered that, upon payment by defendant of the amount so found due, his title to the lots in controversy be quieted and confirmed in him.

For reply plaintiff admits the ownership of defendant's grantors at and prior to the confirmation of the sale in said state tax suit and the issuance to plaintiff of the deeds set out; and alleges that by said proceedings defendant's grantors had lost their title to the premises in controversy and that their conveyances to plaintiff were null and void; admits the purchase of the lots for the

sums set out in defendant's answer and again alleges the regularity of all proceedings and the validity of his deeds; admits that defendant had tendered to him full payment of the amounts which he had paid out for said property, including all subsequent taxes and costs, with 7 per cent. interest thereon; and alleges that the amount so paid out by him, with interest at 7 per cent., would be \$130; that the amount so paid out, with 1 per cent. per month interest, would be \$146; that the tax decree rendered against the lots was for the sum of \$271.29; that, if plaintiff's deed should be held to be void and that defendant has the right of redemption, the amount necessary to redeem said lots would be \$514; that neither the defendant nor his grantors have redeemed or offered to redeem said lots; admits that the only final notice given to the owners of said lots is the notice set out in defendant's answer.

Upon the trial the district court found against the plaintiff on his petition as to both of his causes of action; that at the time of the commencement of this suit defendant was the owner in fee simple of the lots in controversy; that plaintiff has no estate or interest in said lots; that the deeds of the county treasurer to plaintiff were of no force and effect and should be canceled, and that the relief prayed for by defendant should be granted, finds the amount expended by plaintiff to be as stated by him in his reply, to wit, the sum of \$130, and that plaintiff is entitled to a lien upon the lots in controversy for said sum, together with interest at 7 per cent. per annum from the time of his purchase until the date of defendant's tender, and adjudged that defendant's title to the lots in controversy be quieted, subject to the lien so found; that the deeds referred to are null and void and are canceled in so far as the lots in controversy are concerned; that plaintiff and all persons claiming under him are barred and enjoined from claiming any interest other than represented by such lien. From this decree plaintiff has appealed.

No evidence was taken; the judgment being rendered upon the pleadings as above set out. The errors assigned are: "First. The lower court erred in holding the tax deeds void by reason of a 'blanket' notice. Second. The lower court erred in setting aside the tax deed and in quieting appellee's title upon payment *only* of the amount the lots sold for at the sale instead of the amount of the decrees against the lots. Third. The court erred in setting aside the tax deeds and quieting appellee's title upon payment of the bid price, with sub taxes and costs and with interest at *only* 7 per cent."

In his brief plaintiff concedes that, under the holding of this court in *Ambler v. Patterson*, 80 Neb. 570, the "blanket" notice rendered the deeds void, but he urges that our decision in that case was wrong and asks us to now recede therefrom. The reason given for asking us to review that question is "that the question was not fully presented to the court upon the hearing of that case — no reference to the question being made in either plaintiff's or defendant's briefs filed therein, and as the authority upon which this court based its decision was to some extent later modified by the supreme court of Iowa," in certain cases noted. We have not taken the time to examine the briefs filed upon the original hearing of *Ambler v. Patterson*, but we have examined the brief filed at that time in support of a motion for rehearing, and find that an able brief of 22 printed pages, prepared by counsel of high standing, was submitted. In 80 Neb. 575, in passing upon the motion for rehearing, Mr. Commissioner DUFFIE said: "A motion for rehearing, supported by a brief of unusual merit, induced us to order a reargument of the case, and to reexamine the opinion herein." The opinion upon rehearing then proceeds to consider the argument advanced in support of the contention that the original opinion was wrong, and concludes thus: "Further consideration and reflection has convinced us that our former holding is right, and should be adhered to." Plaintiff here was defendant in that suit. He was given

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a full hearing at that time. The opinion and judgment of this court complained of were carefully considered on the application for a rehearing and adhered to. The judgment there announced has stood unchanged and unchallenged for more than three years, and, considering the nature of the question involved, it ought now to be considered as a rule of property in this state. We must therefore decline to again consider the question. This disposes of plaintiff's first assignment.

The second and third assignments may be considered together, and, we think, must both be decided adversely to plaintiff's contention. The case under consideration here is a plain, ordinary suit to quiet title. Plaintiff bases his title upon deeds received by him in a proceeding which he sets out. He asserts, and relies throughout the trial upon the assertion, that those deeds were valid and vested in him a perfect and indefeasible title. The question of redemption from a tax sale is not raised, but his demand simply is that his title be quieted because of the fact that he holds what he alleges are valid deeds which vest in him the title to the property. Defendant alleges that the deeds are invalid and never vested any title whatever to any of the property in plaintiff, but offers to do equity by repaying plaintiff the consideration which he paid for his void deeds, together with all moneys that he had paid out or expended in connection therewith and for subsequent taxes, etc., together with 7 per cent. interest. We think this was all that defendant was required to do, and that the trial court was right in so holding.

The judgment of the district court is therefore

AFFIRMED.

GOODYEAR TIRE & RUBBER COMPANY, APPELLANT, v. FRANK
W. BACON, APPELLEE.

FILED MARCH 12, 1912. No. 16,640.

1. **Evidence:** BOOKS OF ACCOUNT. Section 346 of the code defines the circumstances under which books of account are receivable in evidence. The evidence in the case at bar examined, and *held* entirely insufficient to bring the offer of plaintiff's books of account within the provisions of said section.
2. **Evidence** examined, and *held* sufficient to sustain the action of the trial court in directing the verdict.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

William N. Chambers, for appellant.

Baldrige, De Bord & Fradenburg, contra.

FAWCETT, J.

This action was instituted in the county court of Douglas county upon an account for merchandise sold and delivered to defendant. By his answer in that court defendant denied one item in the account, and claimed a discount on the residue of 10 per cent., and offered to confess judgment for the balance, with interest to the time of filing the answer, and for costs. When the case reached the district court by appeal, defendant filed a similar answer and offer to confess judgment. When plaintiff rested, defendant moved the court to direct a verdict in favor of plaintiff for the amount for which defendant had offered to confess judgment, with interest to the time of making his offer in the county court. This motion was sustained, a verdict entered in accordance therewith, and judgment entered upon the verdict, from which plaintiff appeals.

The only "points" assigned in plaintiff's brief are: Did the evidence prove the allegations of the petition to

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such an extent that the case should not have been taken from the jury? That the court erred in ruling out the following question asked of the witness Nash, who was a bookkeeper in the office of the plaintiff at Akron, Ohio: "Q. You may state the amount appearing on the books of the Goodyear Tire & Rubber Company as owing to said company by Frank W. Bacon, the defendant, Omaha, Nebraska;" and that the court erred in excluding exhibit B.

It would serve no good purpose to set out the evidence. We have carefully read it all and find that it is ample to sustain the trial court in directing a verdict as was done. As to the second and third points above set out, it is sufficient to say that neither the books of the company nor exhibit B were established in any such manner as to render them competent as evidence against the defendant. Code, sec. 346.

The judgment of the district court was clearly right, and it is

AFFIRMED.

JOHN TIGER, APPELLEE, V. BUTTON LAND COMPANY ET AL.,
APPELLANTS.

FILED MARCH 12, 1912. No. 17,006.

Quieting Title: EVIDENCE: FRAUD. Evidence examined and partially set out in the opinion, *held* sufficient to sustain the findings and decree of the district court.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Flansburg & Williams and Leonard A. Flansburg, for appellants.

E. J. Clements, contra.

FAWCETT, J.

From a decree of the district court for Lancaster county, canceling certain notes and a mortgage upon the northwest quarter of section 29, township 11, range 8, in Lancaster county, and ordering the execution of a deed by plaintiff to defendant H. E. Gibson for certain lands in Costilla county, Colorado, together with certain shares in two irrigation companies in that county, and canceling a deed to the land in Lancaster county, above described, executed by plaintiff to one H. Ross, and a deed to said lands executed by said Ross to defendant Free, and quieting plaintiff's title in and to said land, defendants appeal.

The brief of defendants contains three assignments of error, as the grounds upon which the appeal is based: (1) That the evidence is not sufficient to sustain the findings and decree. (2) That there was no actual fraud on the part of defendants and no damage to plaintiff, and that in any event plaintiff, by his acts and conduct after discovering the fraud and deception, waived his right to rescind. (3) That the settlement pleaded was in full force and effect, and that the court erred in not giving full faith and credit thereto.

The record shows that defendants A. L. and B. G. Button are brothers, and in 1908 were doing business under the name of "Button Land Co." Their stationery set forth that the company had a capital of \$300,000; that A. L. Button was president and B. G. Button secretary and treasurer. In February, 1908, W. S. Tiger, a brother of plaintiff, who was then in the service of the Buttons as a soliciting agent, contracted with them for the purchase of 80 acres of land in the San Luis Valley, Colorado, for the sum of \$2,800, upon which he paid \$600 in cash, and agreed to apply certain of his salary on the purchase price of said land. While so employed he introduced plaintiff to his employers. The Buttons at that time were conducting excursions from Lincoln to the San Luis Valley.

Upon one of those excursions, which started from Lincoln about March 8, 1908, plaintiff, with a number of others, accompanied the Buttons on a trip through the valley named. Plaintiff testified that when they reached the valley the Buttons had conveyances ready in which they took the excursionists to Monte Vista, and showed them some irrigated farms near that place, telling them what immense crops were raised on the land shown, that the land was selling for \$150 to \$200 an acre, and that the land which they had to sell was just as good as that land. On the day following, the excursionists, including plaintiff, were taken by the Buttons and shown the lands which they wished to sell. These lands were in the vicinity of Mosca. On this trip plaintiff rode in a carriage with defendant A. L. Button. Much of the land shown had the appearance of having been improved and cultivated and then abandoned. Plaintiff asked Mr. Button the reason for this, and was informed by him that it was on account of the lands being in litigation, which resulted in the water being shut off and that the people had to move out, but that the litigation had been settled and many of them were returning again. Just before reaching a certain quarter section, Mr. Button told plaintiff that the place they were coming to was a bargain; that the owner, who lived in Iowa, had been holding it at \$50 an acre, but had been speculating, was hard-up for money, "and had given them an option on it at \$40 an acre cash; that the time was nearly up and they had to sell it pretty quick;" that he told plaintiff that this land was just as good as that he had shown them at Monte Vista; that two water rights went with it sufficient to irrigate the land, and that it was a great bargain at \$40 an acre; that he told Mr. Button that he (plaintiff) knew nothing about that country or the land or of irrigated lands, and that if he bought he would have to depend on Mr. Button's judgment for he knew nothing about it; that Button told him he could do so "as they had investigated it and knew it was all right;" that he then told Button that he had no

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money with which to buy land; that if he bought it he would have to put a mortgage on his Lancaster county farm; that Mr. Button said they would attend to that; "that he could get the money for plaintiff any day;" that plaintiff relied upon the statements and representations made by Button and was thereby induced to and did agree to purchase the quarter section at \$40 an acre. Upon their return to Nebraska, Button had a mortgage prepared for \$6,400 upon plaintiff's farm in Lancaster county, which the undisputed evidence shows was then worth \$16,000, encumbered by a \$1,500 mortgage. The mortgage for \$6,400 was executed by plaintiff and his wife and delivered to Button. For this plaintiff was entitled to receive a deed to the quarter section of land in Colorado, clear of all incumbrances. This mortgage was executed to defendant J. W. Drown, as mortgagee. Drown is the father-in-law of defendant B. G. Button. After entering into the agreement for the purchase of the quarter section of land in Colorado, and before the execution of any deed therefor to plaintiff, defendants Button undertook, as agents for plaintiff, to sell his equity in the Lancaster county farm, which at that time, under the undisputed evidence, was worth \$8,100. For doing this they were to receive a commission of \$400. Shortly after undertaking the sale of this equity, Button represented to plaintiff that he could obtain, in exchange for his equity, two quarter sections of the Colorado land, situated not far from the quarter he had already purchased, each of which was equally as good land as the first quarter, and was worth from \$35 to \$40 an acre. Plaintiff stated to him that he did not know anything about the land, but would have to trust to them entirely; that if they thought it was a good deal for him, and if they could sell the land, to go ahead and make the trade. Shortly thereafter defendant took a man to plaintiff's home upon the Lancaster county farm, representing him to be the owner of the Colorado land (but who was in fact an employee of the Buttons), who had come to look the

farm over. Plaintiff showed him through the buildings and he departed. This was on Saturday. On Monday A. L. Button informed plaintiff that he had succeeded in making the trade, and stated that he never had worked so hard in his life to get a deal through. Button then had a deed of plaintiff's land prepared, running to H. Ross as grantee, who plaintiff supposed was the owner of the Colorado land, but who was in fact a sister-in-law of one of the Buttons. Up to this time plaintiff had not received a deed from the Buttons to any of the Colorado lands. The evidence shows that the statements made by Button to plaintiff, when they were out upon the Colorado land, that the owner of the land had been holding the same at \$50 an acre, but on account of being hard-up was willing to make a sacrifice and sell it at \$40 an acre, were untrue. Mr. Foster, who was the then owner of that land, testified that he had not been engaged in any speculation, was not hard pressed for money, had never asked \$50 an acre for the land, but, on the contrary, at the very time Button made the representations above set out, he had the quarter section listed with a real estate agent at Colorado Springs at \$13.75 an acre, payable \$1,000 in cash and a mortgage upon the property for the other \$1,200. After Button had succeeded in making his deal with plaintiff and had obtained from him the \$6,400 mortgage, he then sought out Mr. Foster's agent at Colorado Springs and purchased the quarter section of land, which he had sold to plaintiff for \$6,400, for \$2,400, taking a deed therefor in the name of his sister, H. E. Gibson. He paid the agent \$1,000 in cash and executed a mortgage in the name of H. E. Gibson for \$1,200, the other \$200 going to the agent as commission. After making the agreement with plaintiff to trade him the other two quarter sections for his equity in his Lancaster county farm, of the value of \$8,100, they obtained from one Albert S. Harper a deed to H. E. Gibson for one quarter, and from one Oliver H. Blank a deed to Gibson for the other

quarter, paying for each quarter \$800. Button then, in the name of H. E. Gibson, executed a deed to plaintiff for the three quarter sections, subject to the \$1,200 mortgage upon the first quarter, in favor of Mr. Foster from whom they had purchased it. For the \$400 commission, which they were to receive from plaintiff for selling his farm, they obtained plaintiff's note. It will be seen that the \$1,200 mortgage, which they had plaintiff assume, plus the \$400 commission note which they received from him, exactly equalled the amount which they paid for the two quarter sections of land they had traded him in exchange for his equity. So that, instead of receiving a commission of \$400 for their services, they received the equity in the farm, worth \$8,100; and for the mortgage of \$6,400, which they received from plaintiff, they paid out \$2,400, making their total profit in the round-up of plaintiff which they had succeeded in making, \$12,100. The evidence shows that neither Drown, who was named as mortgagee in the \$6,400 mortgage, nor H. E. Gibson, in whose name the title to the Colorado lands was taken and then conveyed to plaintiff, nor H. Ross, in whose name the deed to the Lancaster county farm was taken, had any interest in any of the transactions or knew anything about them, but that in all of these transactions the Buttons were the real parties interested, and the three relatives named were mere dummies. The evidence also shows that the deed from H. E. Gibson to plaintiff for the Colorado lands was never signed by Mrs Gibson, but that the name, "H. E. Gibson," was signed by A. L. Button, who admitted upon cross-examination that he may have attempted to imitate the handwriting of H. E. Gibson in making the signature. The deed is acknowledged before one Nellie Sheehy, notary public, who certified that "H. E. Gibson (Single)" personally appeared before her and acknowledged the execution of the deed to be "his" voluntary act and deed. Miss Sheehy was an employee of the Buttons. Mr. Button attempts to justify his action in signing the deed as was done, by tes-

tifying that he had a power of attorney from his sister, H. E. Gibson, authorizing him to sign her name to deeds and other instruments, and that he supposed that it was all right to sign that way. It is incredible that, after transacting business as a real estate dealer for about 20 years, in seven states and territories, with offices in something like 15 cities in those states, he should be ignorant of the fact that his power of attorney did not give him authority to sign a deed in any such manner. That the whole scheme of using the names of their relatives, and in using the initials of the christian names of the two ladies, was to hide their tracks and enable them to carry out their "peculiar" methods, is apparent. The learned district judge, sitting as a court of equity, and weighing the evidence introduced upon the trial of the case, regarded these transactions as so unconscionable that he set them all aside. We are now asked to reverse the action of the learned district judge upon the ground that the evidence is not sufficient to sustain the judgment. Our answer must be that far less evidence than is shown in the record before us would have been sufficient.

But it is said that plaintiff, by his acts and conduct after discovering the fraud and deception, waived his right to rescind. It is true that, after discovering the deception and fraud which had been practiced upon him, plaintiff, who had been a farmer all his life, did not act with the promptness that would have been shown by men of experience in the business world. He may have been more trustful than a shrewder man would have been, but in a court of equity cupidity is not a good offset against stupidity. We hold that the evidence was sufficient to sustain the decree; that actual fraud on the part of defendants and damage to plaintiff are shown, and that plaintiff's acts, after discovering the fraud, were not, under the circumstances shown, sufficient to constitute a waiver of his right to maintain this suit.

Was the settlement pleaded in defendants' answer proven? We think not. While it is sworn to by one of the

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defendants and one of the employees in their office, and by the witness Wilson (who we think was successfully impeached), the circumstances surrounding the transaction and the execution of the so-called settlement agreement, exhibit 3, the inclusion therein of the adjustment of the matters in controversy between defendants and plaintiff's brother, together with the fact that the \$400 note, which defendants' witnesses say was produced from defendants' safe and placed upon the table before plaintiff and defendants at the time of the execution of the agreement, was not delivered to plaintiff, but was retained by defendants and found in their possession at the time of the trial, all so strongly corroborate the testimony of plaintiff that the district court was justified in discrediting defendants' witnesses and finding for the plaintiff upon that point.

We do not deem it necessary to refer to or discuss any of the authorities cited. There is no question of law involved in this suit which is not perfectly familiar to every member of the profession. We think counsel for plaintiff is warranted in his contention that, when defendants undertook to represent plaintiff in the sale of his equity in the Lancaster county farm, a fiduciary relation was created between them, and that the rules of law requiring a full disclosure by and the utmost good faith on the part of an agent in dealing with his principal apply; and that, defendants having themselves merged the deal as to the first quarter section into their subsequent dealings with plaintiff as his agent, the whole transaction from start to finish should be treated as one. There is no theory of law or in equity that will warrant our disturbing the righteous judgment entered by the district court.

The judgment is therefore in all things

AFFIRMED.

HERMAN BARNHARD ET AL., APPELLANTS, V. VIRGIL F.
BARNHARD ET AL., APPELLEES.

FILED MARCH 12, 1912. No. 16,639.

Appeal: AFFIRMANCE. The evidence is found to be insufficient to support a judgment in favor of the plaintiffs, and, that being the only question presented, the judgment of the district court dismissing the action is affirmed.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Affirmed.*

H. C. Vail, for appellants.

A. E. Garten, contra.

SEDGWICK, J.

In the years 1880 and 1881 the defendant Virgil F. Barnhard was the owner of the quarter section of land in question, which was occupied as a homestead by himself and his wife, Minerva Barnhard. These plaintiffs are the children and grandchildren of the defendant Virgil F. Barnhard and the said Minerva Barnhard, and have brought this action to establish an interest in their favor in the land. They allege that during the years mentioned Virgil F. Barnhard conveyed the land by deed to his wife, Minerva Barnhard, and that some five years afterward Minerva Barnhard died, and that the children of Minerva Barnhard inherited the land from their mother subject to the life estate of Virgil F. Barnhard. One of the daughters of the defendant Virgil F. Barnhard and Minerva Barnhard refused to join in bringing the action and was for that reason made a defendant. Another daughter was joined as plaintiff, but afterward renounced all interest in the land and asked to be dismissed from the action. The district court found for the defendants and dismissed the action, and the plaintiffs have appealed.

Barnhard v. Barnhard.

The defendant Virgil F. Barnhard denied that he ever conveyed the land to Minerva Barnhard, and this is the question now presented in this appeal. The plaintiffs insist that the evidence is of such a character as to require the finding that the deed was executed and delivered as alleged.

It appears that the defendant Virgil F. Barnhard continued to occupy the premises as a homestead, and some 17 years before the commencement of this action he was married again, and together with his present wife has continued to occupy the premises as their home up to the present time. If the contention of the defendant is right and no deed was executed by him to his former wife, his present wife has an interest in the land and will be entitled to occupy the same as her home during her life. She was not made a party to these proceedings, but this fact is not now insisted upon, and we will dispose of the case upon other grounds.

The plaintiffs called one W. J. Nelson as a witness, who had resided at Albion, in Boone county (in which county the land lies), for several years from 1871 to 1882, and was well acquainted with Mr. and Mrs Barnhard. He appears to be a reliable witness, and testified that he remembered the transaction of making a deed "for that homestead land," and that in 1880, or "along there some time," Mr. Barnhard and his wife came to him "about some protection against a debt. I think it was some collections that the bank held against them. I think it was a thrashing machine they had some difficulty about, and they were pressed about the matter and spoke to me about what would be exempt, and the matter was talked over at that time, and they had more land than their homestead and they inquired of me about making a deed to his wife. I had some doubt whether a man could deed to his wife. It was an unsettled question at that time, and I had to take some time to examine into it, and I decided they could and I made a deed for them and turned it over to Mrs. Barnhard." They also called a Mr. Robinson as

with him, executing the mortgage as his wife. No claim was made by Mrs. Barnhard or by any of these plaintiffs of any interest in the land until this action was begun. There was no evidence tending to show that Mr. Barnhard conveyed this land to his wife as a gift. So far as any motive is shown for making and receiving this deed it was for the purpose of delaying creditors. The plaintiffs allege this to be a sufficient reason for making the conveyance because the land, although the homestead at that time and not worth more than \$2,000, was increasing in value, and for that reason both parties to the deed thought that they would be more secure if the conveyance were made. But, nevertheless, the plaintiffs also contend that there could be no fraudulent intent on the part of the parties to the deed, which would prevent the interference of a court of equity on behalf of either of them, because the land was a homestead and wholly exempt. If such a conveyance was innocently made and was not intended nor received as a gift, it would convey no beneficial interest. The defendant Barnhard testified directly and positively that no such deed was ever executed. There are other circumstances than those already suggested which tend to support him in this testimony. No such deed could be found, and, even if it were executed for the purpose of protecting the parties to it against the claims of creditors, it was afterward disregarded by both parties when they mortgaged the land, and was evidently never delivered and relied upon as a valid conveyance. We think that the evidence is wholly insufficient to establish the plaintiffs' claim.

The judgment of the district court is

AFFIRMED.

PATRICK RODDY, APPELLEE, v. MISSOURI PACIFIC RAILWAY
COMPANY, APPELLANT.

FILED MARCH 12, 1912. No. 16,756.

1. **Appeal:** ABANDONMENT OF APPEAL. If the petition alleges two distinct causes of action and the judgment is for a gross amount upon both causes of action, the defendant will not be held to have abandoned his appeal to this court from the judgment as rendered, although the verdict finds specially upon each cause of action and the errors assigned in the brief relate to one cause of action only.
2. ———: ABSTRACT. If the party preparing the abstract has not given the other party an opportunity to make suggestions as to what the abstract should contain, and has purposely or carelessly omitted matters material to the determination of the case, and such defects are complained of and supplied in an additional abstract by the other party, the rules will be construed liberally in favor of the party not in fault.
3. **Railroads:** SETTING OUT FIRE: EVIDENCE. The evidence which is stated in the opinion is found to be insufficient to support the judgment.

APPEAL from the district court for Otoe county:
LEANDER M. PEMBERTON, JUDGE. *Reversed with directions.*

F. A. Brogan and B. P. Waggener, for appellant.

Thomas F. Roddy and A. A. Bischof, contra.

SEDGWICK, J.

The plaintiff in his petition alleged two causes of action, and judgment was entered in his favor upon both of them. The defendant has appealed, and alleges that the evidence is insufficient to support the judgment upon the second cause of action. The second cause of action was for damages caused by a fire which passed over the plaintiff's land and injured his trees and perhaps other property. It was alleged that this fire was caused by the neg-

ligence of the defendant, and the question is whether this allegation is supported by the evidence.

1. The first objection is that the defendant's motion for a new trial in the district court was properly overruled because it was a joint motion, "being directed to both causes of action in plaintiff's petition." It is recited in the plaintiff's brief that the appellant abandoned its appeal with reference to the first cause of action. The assignments of error in the defendant's brief are wholly with reference to the second cause of action, no errors being assigned directly affecting the first cause of action. This waiving of errors as to one cause of action cannot be said to be an abandonment of the appeal in any respect, and we find nothing in the abstract of the record from which it can be determined that the defendant has abandoned its appeal. In the motion for a new trial the defendant assigned errors in connection with both causes of action. The jury found the amount of plaintiff's damages on each cause of action separately, but the judgment of the court was for the gross amount. No separate judgment was entered on the first cause of action. The appeal was necessarily taken from the judgment as entered. If the court had entered judgment on each cause of action separately, the question might have been presented whether the defendant could appeal from one of those judgments without appealing from the other also. In the condition of this record we do not think that this question is presented. This objection of the plaintiff is not well taken.

2. The plaintiff has discussed in the brief some matters that are not disclosed by the abstract. The abstract was prepared by the defendant, and, if found to be deficient or incorrect in any respect, the plaintiff should have furnished an abstract correcting those defects. If the party preparing the abstract has not given the other party an opportunity to make suggestions as to what the abstract should contain, and has purposely or carelessly omitted matters material to the determination of the case, and such defects are explained in an additional abstract by the

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lend such assistance is no more than right and duty, no matter how the fire originated. It may be that one of the defendant's trains did pass this place at the time the fire originated, and that the engine threw out sparks which caused the fire, but such a supposition is wholly conjectural and not supported by any evidence whatever. Under this evidence conjectures as to an entirely different origin of the fire may be indulged with equal propriety. Judgments cannot be supported by such conjectures, and this judgment is unsupported. The plaintiff is entitled to an affirmance upon remitting the amount found by the jury upon the second cause of action. The judgment as entered is reversed, and the district court will enter a judgment upon the verdict for the amount found upon the first cause of action, and proceed further upon the second cause of action in accordance with this opinion.

REVERSED AND REMANDED.

PINE-ULE MEDICINE COMPANY, APPELLEE, v. YODER &
EPLY, APPELLANTS.

FILED MARCH 26, 1912. No. 16,653.

1. **Pleading: CAPACITY TO SUE: DEMURRER.** Where it appears on the face of the petition that the plaintiff has no legal capacity to sue, such defect should be taken advantage of by demurrer, and not by answer.
2. ———: ———: **ANSWER: SURPLUSAGE.** Where the defect appears upon the face of the petition and the defendant answers to the merits, a statement in his answer that the plaintiff has no legal capacity to sue will be treated as surplusage.
3. **Evidence examined, and found sufficient to sustain the judgment.**

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

A. D. McCandless, for appellants.

S. D. Killen, contra.

BARNES, J.

Action for the recovery of money alleged to be due from defendants to plaintiff for certain proprietary medicines sold and delivered to defendants on a written order. It appears that the cause was originally commenced in the county court of Gage county, where the plaintiff had the judgment, and the defendants appealed.

Plaintiff's petition in the district court was entitled "The Pine-Ule Medicine Company, Plaintiff, v. Yoder & Eply, a partnership formed for the purpose of doing business in the state of Nebraska, and not incorporated, consisting of Elva Yoder and ——— Eply (first Christian name unknown), partners, Defendants." Then followed a statement of the plaintiff's cause of action, and there was attached to the petition as an exhibit a written order for the medicines, for sale of which recovery was sought, together with a list of the medicines alleged to have been sold and delivered to the defendants. To this petition the defendants filed an answer in part as follows: First. That the plaintiff has no legal capacity to sue, and therefore cannot maintain this action as shown by the petition. Second. That the allegations of said petition are not sufficient to constitute a cause of action in favor of the plaintiff and against the defendants, or to entitle plaintiff to the relief demanded. Third. Defendants deny each and every allegation in said petition contained. Fourth. A plea to the merits, in which it was alleged that the defendants took the agency from plaintiff for the sale of certain goods, a part of which they sold; that the contract was terminated, and that all goods on hand were delivered to the plaintiff prepaid, and the amount due for the goods sold was remitted to and accepted and retained by plaintiff. The reply was a general denial. Upon a trial to the court without the intervention of a jury, the plaintiff again had the judgment, and the defendants have appealed.

Defendants assign error as follows: Plaintiff has no

legal capacity to sue or maintain the action. Second. The petition does not state facts sufficient to constitute a cause of action. Third. The finding and judgment of the court are contrary to law; the finding and judgment of the court are contrary to the evidence, and are not supported by any competent evidence.

In disposing of the first assignment of error, it is sufficient to say that want of plaintiff's legal capacity to sue appeared upon the face of the petition. Therefore, the plaintiff should have taken advantage of this defect by demurrer, as provided by the second subdivision of section 94 of the code. Section 96 of the code provides: "When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." It thus appears that, where the defect complained of is apparent upon the face of the petition, it is not to be challenged by answer.

It may be suggested that the first paragraph of the answer is in effect a demurrer; and, if the answer had contained nothing more than that paragraph, it might have been considered as a demurrer; but when the defendants answered over to the merits they waived the objection that the plaintiff did not have the legal capacity to sue. The rule is well settled that by answering to the merits the defendant waives his right to demur to the plaintiff's petition, and that part of his answer, which in form amounts to a demurrer, will be treated as surplusage. *Kyner v. Whittemore*, 90 Neb. 188. It follows that the defendants' first assignment of error must fail.

It is contended that the petition does not state facts sufficient to constitute a cause of action. It is argued that the original contract attached to the plaintiff's petition, and found in the bill of exceptions, is a contract of

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agency, and not one of sale. By the terms of that instrument the plaintiff appointed the defendants retail distributing agents for the sale of its medicines, and agreed that the defendants might purchase of the plaintiff the proprietary medicines manufactured by it (naming them) for certain prices therein specified. Certain restrictions were contained in the instrument which bound defendants not to sell plaintiff's medicines to wholesale or retail dealers, not accredited agents of the company, nor to any person, firm or corporation at less than the retail price printed on each package of its remedies. The contract also contained certain other restrictions, and it was provided that, in case of a violation of those provisions, the plaintiff should be entitled to recover \$24 as liquidated damages. There followed an order for the purchase of the medicines in question, which was signed by the defendants. It is therefore apparent from the terms of the order itself that the defendants purchased the remedies for which the plaintiff sued to recover the purchase price.

An examination of the record discloses that the plaintiff's testimony was sufficient to sustain the judgment; and, the defendants having offered no evidence, it follows that the judgment complained of was right.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

A. L. CHASE, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MARCH 26, 1912. No. 16,622.

1. **Master and Servant: INJURY TO SERVANT: DEFECTIVE APPLIANCES:**
DUTY OF MASTER. Where a boy, between the age of 17 and 18, inexperienced in railroad work, was employed at night as a hostler helper, and a part of his duty was, when the engines were taken to the coal chutes, to go upon the top of the tender, to call

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up to the man in charge of the chute, whose station was above, and ask from which bin the coal was to be taken, to indicate to the person moving the engine where to stop, to lower the apron in order to deliver the coal, to distribute it in the tender, and to raise the apron thus closing the chute, all being done by the light of a lantern, and it appeared that the track was defective so that the engine and the structure of the coal chute were in dangerous proximity, and that iron bolts projected from the side of the posts supporting the structure, *held* that it was the duty of his employer to warn him of the peculiar dangers connected with the coaling of engines at that place.

2. ———: ———: ———. An employee is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard from the negligent construction or location of a structure in dangerous proximity to a defective railway track will not be imputed to a boy between 17 and 18 years of age who had been employed for about three weeks, doing his work at night by the light of a lantern, merely because he was aware of the general surrounding conditions.
3. ———: ———: ———: ASSUMPTION OF RISKS: QUESTIONS FOR JURY. Unless from the undisputed facts a court can declare, as a matter of law, that the employee actually had or was chargeable with knowledge of the dangerous condition of the place where he worked or the defective condition of the structures and appliances in connection therewith, so that he assumed the risk, those questions should be submitted to the jury. *Tobler v. Union Stock Yards Co.*, 85 Neb. 413.
4. ———: ———: TRIAL: INSTRUCTIONS. It is not erroneous to instruct a jury, in substance, that the natural instinct and disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person injured or killed was at the time in the exercise of ordinary care, and that it should, in determining this question, consider all the evidence and the circumstances proved.
5. ———: ———: NEGLIGENCE OF MASTER: EVIDENCE. Evidence examined, and *held* to establish the negligence of defendant in respect to the construction, maintenance and manner of operating a coal chute and the track adjacent thereto.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

James E. Kelby and Frank E. Bishop, for appellant.

W. B. Comstock and G. W. Simpson, contra.

LETTON, J.

Burton A. Nunn was killed as the result of an accident occurring at the coal chute of defendant in the Lincoln yards on February 14, 1907. The plaintiff is the administrator of his estate. This action was brought to recover damages for the death of Nunn, based upon the alleged negligence of defendant in the construction and maintenance of its coal chute and the track adjoining the same. Plaintiff recovered a judgment, from which defendant has appealed.

The deceased was a young man between 17 and 18 years of age. He had worked for the defendant as helper for a night hostler named Young for three weeks, and had never worked in the yard or about the coal chute in the day time. In addition to other duties usually performed by a hostler helper, it was the duty of Nunn when the engines were taken to the coal chutes to go upon the top of the tender, to call up to the man in charge of the chute, whose station was above, and ask from which bin the coal was to be taken, to indicate to the person moving the engine where to stop, to lower the apron in order to deliver the coal, to distribute it in the tender, and to raise the apron thus closing the chute. On the night of the accident two locomotives coupled together, which had been used as a "doubleheader," had just come in from being used upon a train. The engines were headed south. The north engine was out of repair or "dead," and the two were operated by the south engine. The hostler, Young, with two helpers, Nunn and Eitel, went upon the north engine, and another hostler, Freeland, and his helper went upon the south engine. Nunn entered the engine at the gangway, or open space between the fire-box and the tender. Young began to adjust the air valve on

the engine, when Freeland on the other and live engine started to back both engines to the north on the west side of the coal chute. The engines moved only a few feet when Freeland abruptly stopped. He testifies he could give no reason for so doing. The moment the engines stopped, Young, who was on the side of the cab farthest from the chute, heard the sound of breaking glass on the side of the cab next to the chute. A moment before Nunn was seen standing by him directly in front of the opening to the coal box from the gangway. When Young heard the glass break he stepped to the side of the engine next to the chute, and there discovered Nunn hanging by the collar of his coat on the projecting end of a stay-rod extending through a post on the west side of the chute at a point about 3 or 4 feet south of the south end of the cab, his head partially crushed. He was unable to speak and died next morning.

The petition alleges that Nunn was, on account of his age and inexperience, wholly unacquainted with the dangers and hazards of the employment. It is further charged that the posts of the coal chute were carelessly and negligently constructed too close to the railway track; that defendant had carelessly and negligently allowed the track adjoining the chute to become out of repair and to sag on the side next to the chute so far as to cause engines and tenders in passing along the track to lean towards and strike against the chute; that about 8 or 10 feet above the ground the end of a large iron bolt projected towards the railroad track a distance of about 3 inches horizontally; and that by reason of defendant's negligence in maintaining the posts with the bolts therein so close to the railway track, in maintaining the railway track so close to the post, in permitting it to become defective and to settle and sag next to the posts, and in failing to warn and instruct Nunn and to furnish proper and safe appliances, Nunn was caught and crushed, from the effects of which he died. The defense is a general denial, and pleas of assumption of risk and contributory negligence.

The coal chute was originally constructed about 20 years ago when smaller engines were generally employed in the service. It stood upon a stone foundation about 2½ or 3 feet high, upon the top of which were timbers about 15 feet long, supporting bins in which coal was stored; the space underneath the bins being open. These timbers were tied or fastened together with iron rods extending from side to side and fastened with washers and nuts on the outside of the posts. The particular rod or bolt upon which Nunn was suspended projected about 2½ or 3 inches from the post, a portion of which extension, however, was taken up by the washer and nut. The testimony is conflicting as to the height of the projecting bolt with reference to the engine. The witness Slye, who was working for the defendant at the time but who was at the time of the trial not in its service, testified that it was a dark and cloudy night at the time of the accident, that he was working about 120 feet away from the place, that he helped to take Nunn down, and that the projecting bolt would be below the eaves of the cab somewhere between 6 or 8 inches, and would be 3 or 4 feet above the head of a person of Nunn's size if he was standing in the gangway. The testimony on this point on behalf of the defendant is that the bolt was below the sill of the cab window; one of the witnesses testifying that it was 8 inches below the bottom of the window. This is practically the only point upon which there is a serious conflict in the testimony. It appears that the overflow from a water-tank nearby, used to furnish water for the engines, had run down near and about this track, and that on this account the rail on the side next to the coal chute had settled in such a manner as to incline the engines towards the chute, thus leaving a very small space between the large engines and the posts. There is no dispute, but that the rail next to the chute was irregular and uneven both vertically and horizontally, and that it had settled so that large engines came very near the posts; and there is some testimony that they sometimes rubbed the same near the south end of the

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chute. It was also shown that the supporting timbers of the coal chute at the point where the accident happened bulged towards the track. A moment before the accident, Nunn was standing in the gangway behind the other helper who was working with the fire-box. There were no foot-boards on the side of the engine. There is no testimony as to his movements after he left the position where he was last seen before the accident, or the exact position in which he was when he was caught by the projecting bolt and crushed between the engine and the chute. If the testimony of plaintiff's witnesses with respect to the height of the bolt is to be believed, he must have been standing upon the tender where it was his duty to be when the engine stopped and he was caught by the projection, and there is sufficient testimony to sustain the verdict of the jury upon this point if they believed the witnesses for the plaintiff. On the other hand, if the testimony of defendant's witnesses as to the height of the bolt is taken as true, Nunn must have been caught as he stood in the gangway looking up to the coal bins so as to notify the person operating the engines where to stop. He had the right to be in either place. He could not have been in the cab, since the window was evidently broken by the crushing of his body between the cab and the post as the engine was backed.

The defendant contends that no negligence is alleged or proved which was the cause of the injury, that the danger of the place was manifest during Nunn's service, that he assumed the risk, and that the injury was the result of his own negligence. We are compelled to take another view. No person saw Nunn fall or saw him caught by the projecting rod; but, taking all the circumstances into consideration, it is evident that the negligence of defendant in permitting the track to sag so as to tilt the moving engines towards the chute, in permitting the posts of the coal chute to bulge towards the track, and the rods fastened thereto to project far enough to catch and hold the clothing of the deceased while he was on the engine.

must have been the cause of the accident. The accident occurred in the month of February. The deceased went to work at or after 6 o'clock in the evening. He was furnished a lantern to work by; there seems to have been no fixed light near. There is no evidence that he had ever been warned or notified in regard to these dangerous projections; in fact, the evidence justifies the conclusion that he had never been so warned. We are further of the opinion that it was the duty of the defendant to warn and instruct this boy of the peculiar dangers surrounding his employment at the south end of the coal chute, where the combination of sagging track, bulging posts, and projecting rods, when considered in connection with the fact that he was inexperienced and his work was to be performed at night by lantern light, formed a particularly dangerous combination. Neither are we of the opinion that, under the facts in this case, he assumed the dangers of such a situation, nor that the accident was the result of negligence on his part.

We think the facts in this case are distinguishable from those in *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649, cited by defendant, but the law laid down therein applies. As said in that case, it is only "when the risks and conditions are known to him or are apparent and obvious to persons of his experience and understanding" that an employee assumes the risk arising from an unsafe place of work. The rule is that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known and so far as they would have been known to one of his experience and capacity by the use of ordinary care. *Kotera v. American Smelting & Refining Co.*, 80 Neb. 648. In the case of *Tobler v. Union Stock Yards Co.*, 85 Neb. 413, opinion by BARNES, J., where the facts were that a watchman's shanty stood by the side of a railroad track so close thereto as to leave less than 17 inches between its projecting eaves and the ladder on the side of an ordinary box car, and a brakeman was hurt by being crushed

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against the structure, the same contention was made as in this case, and some of the same cases were cited by the defendant, but the court held, following *Texas & P. R. Co. v. Swearingen*, 196 U. S. 51: "An employee is entitled to assume that his employer has used due care to provide reasonably safe appliances for the doing of his work. Knowledge of the increased hazard resulting from the negligent location of a structure in dangerous proximity to a railroad track will not be imputed to an employee, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location; and, unless from the undisputed facts the court can declare, as a matter of law, that the employee actually had or was chargeable with such knowledge and thereby assumed the risk, those questions should be submitted to the jury."

It is also contended that the verdict and judgment depend alone upon conjecture and are without foundation. The statement of facts already made is sufficient we think to answer this contention.

It is said that the court erred in giving instruction No. 7, which told the jury, in substance, that the natural instinct and disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person injured or killed was at the time in the exercise of ordinary care, and that it should, in determining this question, consider all the evidence and the circumstances proved. We have often said that, in the absence of direct evidence, there may be a presumption that at the time a person was injured or killed he was in the exercise of ordinary care. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720; *Swift & Co. v. Holoubek*, 60 Neb. 784; *Clingan v. Dixon County*, 74 Neb. 807; *Grimm v. Omaha E. L. & P. Co.*, 79 Neb. 387, 395; *Nilson v. Chicago, B. & Q. R. Co.*, 84 Neb. 595. See, also, 16 Cyc. 1057, and note.

Complaint is made as to the giving or refusal of certain other instructions, but we find no prejudicial error in the ruling of the district court in this respect. The rights of

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the defendant seem to have been carefully guarded at the trial, and the evidence amply sustains the verdict.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

SARAH REDMAN, APPELLEE, V. FIDELITY ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED MARCH 26, 1912. No. 16,645.

Insurance: PAYMENT OF PREMIUMS. An accident insurance company received from its collector the amount of premium money due from a member for the renewal of monthly insurance. It appeared that the collector, pursuant to an agreement with the member, furnished the money on the pay-day, placed it in a separate fund with that collected from other members and remitted the whole amount to the company at the usual time. The company, having heard of the death of the insured before the receipt of the money from the collector, retained the premium money of all except the deceased member which it attempted to return to the collector by check. *Held*, That it was immaterial who furnished the money, and that, under these facts, the insurance was in force at the time of the death of the insured.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed*.

Burkett, Wilson & Brown, for appellant.

H. C. Vail and J. A. Price, contra.

LETTON, J.

The plaintiff is the beneficiary under a policy issued by the defendant, an accident insurance company, to Charles C. Redman, her son, who was killed in a railroad accident on the 7th day of October, 1908. The policy was issued on June 1, 1908. By its provisions the defendant "hereby insures Charles C. Redman, of St. Edward, Ne-

braska, for the term of one calendar month from noon, standard time, of the 1st day of June, 1908, and for such further periods of time stated in renewal receipts as the payment of premium specified therein will maintain this policy and insurance in force." The question involved is whether this policy was in force at the time Redman was killed. The petition pleads the issuance of the policy and renewal receipts extending the policy until October 1, 1908. It is further alleged that on the 1st of October, 1908, one Frank Bruno, the defendant's agent at St. Edward for the collection and transmission of assessments due from members in that vicinity, paid for Redman \$1 for the renewal of the policy for the month of October, 1908, that Bruno was accustomed to making such payments for members residing in that vicinity, and it was the custom of defendant to receive all such payments and extend the policies of all persons for whom payments were so made. The defense is that Redman defaulted in the payment of the premium due on October 1, and that by such failure his certificate lapsed.

Two assignments of error are presented: That the court erred in admitting the original answer of defendant in evidence; second, that it erred in giving the following instruction: "You are instructed that if you find from the evidence that Frank Bruno, pursuant to an agreement between himself and Charles C. Redman, took of his own money the amount of Charles C. Redman's assessment for the month of October, 1908, and placed the same with the moneys paid by the other members of the defendant company, and credited the said Redman with the amount thereof on the first day of October, 1908, on the notice of assessment sent him by said company, and remitted all such moneys to the defendant company, and that the defendant retained all such moneys except that of said Redman, still such payment and remittance is payment by Redman, and on that issue your finding should be for the plaintiff."

We think it only necessary to notice the latter assign-

ment. Mr. Bruno testified, in substance, as follows: I was collector for the defendant company from about the 1st of June until November, 1908. The middle of the month before assessments became due I received a statement from the company stating those I was to collect from, and on the 1st of the month I paid the assessments of those who had not paid and were good fellows in town. This money I placed in a fund by itself and left it at home with my wife and generally remitted to the company at Lincoln from the 5th to the 7th or 8th of the month. On October 1, 1908, I paid Redman's assessment, marked it paid on the slip, and put the money by itself in the fund with the rest of it. Mr. Redman told me any time he didn't pay his assessment on the 1st of the month for me to pay it for him, and for me to call at the barber shop at any time and he would pay it to me. It was in performance of that understanding I paid the money on the 1st of October, 1908. I didn't see Redman on or after the 1st of October. About the 8th or 9th I sent the money in the fund to the defendant company with all of the dues for all of the members at the same time. They kept the other money and sent me a check for \$1, refusing to accept Redman's assessment. Cross-examination: Exhibit No. 2 is the list that I received from the defendant containing the names of the parties from whom to collect, and upon which I remitted for Mr. Redman. The entries thereon made in pencil, giving the date of October 1 and the amount of the assessment in each case, were made on that day, October 1. I sent exhibit No. 2 to defendant by mail about the 7th or 8th of October after I learned of the death of Redman. Didn't notify them he was dead. I have the check the company returned to me in my possession, not cashed. For the defendant Mr. Corrick, its president, testified, in substance, that Bruno had no authority to make any other arrangement for the payment of the assessments than the receipt of the money; that he, Corrick, had no knowledge until the day before the trial as to the time of the payment of the October assessments,

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except the information contained in exhibit No. 2; that he received this on October 9, 1908, and at that time knew that Redman had already been killed; that he received \$12.50 at the same time and returned by check the \$1 represented by Redman's assessment. Exhibit No. 2 is as follows:

"FIDELITY ACCIDENT INSURANCE COMPANY.

"LINCOLN, NEB., September 19, 1908.

"Mr. F. M. Bruno, St. Edward, Neb.

"DEAR SIR: Below is a list of members who have an assessment due October 1st. You are to detach and retain the duplicate sheet, sending in the original with amount collected less commission. * * *

Name	No.	Amount	Date Paid
Bruno, F. M.....	1480	1.00	Oct. 1, 1908
* * * * *	*	* *	* *
Redman, Chas. E.....	1490	1.00	Oct. 1, 1908"

The amounts of money paid and the date of payment as shown in the two columns above were written in pencil by Bruno.

The insurance provided for by the contract is clearly term insurance from month to month, hence the policy expired by its terms, unless renewed on the first of each succeeding month by the payment of the premium. The testimony of the collector is undisputed that on the 1st day of October he paid the amount due for the insured, placed it in a fund separate from his other money, and on that day marked the amount paid upon the list sent him. The company did not expect or require payment at its office in Lincoln on the first day of each month. The renewal receipts in evidence show they are dated after the time Bruno says he sent the money in August and September and it retained all the money sent for October except that sent for Redman. This was evidently returned for the reason that Mr. Corrick had learned of Redman's death before the money reached Lincoln. Under these circumstances, Bruno, after he had credited Red-

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man and had placed his premium money in a separate fund, became liable to defendant for the amount, as well as for that paid by the other members. The arrangement by which Bruno paid the money for Redman and looked to Redman for repayment was a personal one. If the premium was in fact paid on October 1, it was immaterial to the defendant company who furnished the money to pay it. 1 Cooley, Briefs on Law of Insurance, 484, and cases cited; *Puls v. Grand Lodge, A. O. U. W.*, 13 N. Dak. 559.

We are of opinion that the instruction complained of correctly stated the law. Having reached this conclusion, it is unnecessary to consider the other assignments of error.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

A. J. MINOR LUMBER COMPANY, APPELLEE, v. ELMER E. THOMPSON; A. J. SHUMWAY, INTERVENER, APPELLANT.

FILED MARCH 26, 1912. No. 16,659.

Mortgages: ATTACHMENT: PRIORITY OF LIENS. A prior unrecorded mortgage on real estate, made in good faith and for a valuable consideration, will take precedence of a title derived by virtue of a sale under attachment or execution, if such mortgage is placed on record before the sheriff's deed based upon such proceedings is recorded.

APPEAL from the district court for Scott's Bluff county:
HANSON M. GRIMES, JUDGE. *Judgment modified.*

L. L. Raymond, for appellant.

Wright, Duffie & Wright, contra.

LETTON, J.

The controversy in this case is as to the priority of liens. On January 22, 1908, a writ of attachment was levied in this action on certain real estate belonging to defendant Thompson, who is a nonresident of this state. Service was had by publication, and proof thereof made on March 3, 1908. On the same day a deed was placed upon record from Thompson to "A. J. Shumway, Trustee," to the same property. Afterwards, the trustee intervened in this case and filed an amended answer and cross-petition, alleging, in substance, that on November 25, 1907, Thompson executed to him a trust deed to the property; that the agreement between Thompson and him was verbal and not in writing, and that the deed was in fact a mortgage given to secure Shumway and another against loss or damage by reason of each of them having become sureties upon two several notes of Thompson; that Thompson made default in the payment of each of the notes; that the sureties paid them, and there is now due and owing by Thompson to the sureties \$290.33 and \$83.50, respectively, which is secured by the trust deed; and further alleging that the lien created by the trust deed is prior and superior to that derived under the attachment proceedings. The prayer was for a foreclosure of the trust deed as a mortgage. A copy of the deed and of the notes mentioned are attached to the cross-petition as exhibits. The reply is a general denial. Defendant Thompson made default. The court found for the plaintiff on its count for goods and merchandise; found for the cross-petitioner, that the deed is in effect a mortgage, and was given to secure the notes as alleged; found, further, that the attachment was the first and prior lien upon the real estate, and the lien of the mortgage junior and inferior thereto. Judgment went for the amount due plaintiff, and a decree of foreclosure was rendered for the amount found due under the mortgage. The intervener excepted to the finding making the judgment the prior lien, and has appealed on this point.

No motion for a new trial was filed. The only point necessary to consider, therefore, is whether the findings and decree are sustained by the pleadings. We have repeatedly held that a prior unrecorded deed conveying title, made in good faith and for a valuable consideration, will take precedence of a title derived by virtue of a sale under attachment or execution, if such deed is placed on record before the sheriff's deed based upon such proceedings is recorded. *Harral v. Gray*, 10 Neb. 186; *Mansfield v. Gregory*, 11 Neb. 297; *Naudain v. Fullenwider*, 72 Neb. 221; *Mahoney v. Salsbury*, 83 Neb. 488. The same principle applies with respect to mortgages.

Under the facts alleged as to time, the mortgage created a lien on the property valid between the parties from the date of its execution on November 25, 1907. The attachment proceedings could only operate upon the interest of the debtor in the land. If, however, the mortgagee had withheld the trust deed from record until after a deed based upon the attachment proceedings had been recorded, in that event, by the operation of the recording act, his lien would have become postponed and subsequent to that of the purchaser at sheriff's sale. But, having recorded the mortgage before the judgment in the case was rendered or any sale made thereunder, his prior lien was preserved and the attachment lien was junior thereto.

But plaintiff argues that, since the trust deed recited "This deed is made in trust to secure the performance of certain conditions set forth and contained in a separate agreement bearing even date herewith and signed by the parties hereto," and since these recitals are contradicted by the allegations of the petition that the agreement or contract was a verbal one, the averments of the petition as to the contract being oral are effectually disproved. It also contends that the terms of a trust cannot be shown by parol testimony, and that there is no competent evidence in the record that the intervener has any such interest in the attached property as he claims. It has been often decided here that the actual consideration of a deed,

or that a deed is in fact a mortgage, may be shown by parol.

Under analogous principles it would be proper to show under the pleadings in this case that the recital in the deed, that the defeasance was in writing was untrue, and that the deed was, in fact, executed under a parol agreement to secure Mr. Thompson's sureties as alleged. This being the case, we are satisfied that the allegations of the cross-petition are sufficient to sustain the findings of fact; but we think the court erred in holding as a matter of law that the lien of the mortgage was the junior one.

The judgment of the district court should be modified so as to constitute the lien created by the trust deed the first lien on the property and the lien created by the attachment proceedings the second lien thereon. The judgment of the district court is, therefore, affirmed as to the findings of fact, and the cause is remanded to the district court, with directions to modify the judgment in conformity with this opinion.

JUDGMENT MODIFIED.

REESE, C. J., not sitting.

SAMUEL J. STEWART, APPELLANT, V. SILAS R. BARTON,
AUDITOR, APPELLEE.

FILED MARCH 26, 1912. No. 17,462.

1. **Statutes: CONSTITUTIONALITY: PROVINCE OF COURTS.** The courts will not inquire into the motives prompting the enactment of laws by the legislature or the wisdom of the legislative measures adopted.
2. ———: ———. Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former statutes has no application.
3. ———: ———. The mere fact that an act of the legislature refers by implication to a prior act does not render the new act

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amendatory of the act to which reference is made if in other respects it is a complete act in itself.

4. ———: ———: TITLE OF ACT. The title of an act is "An act to appropriate \$100,000 for the construction and equipment of a laboratory building on the campus of the Medical College of the University of Nebraska at Omaha under the supervision of the Board of Regents." *Held*, That a provision in the body of the act that "said building shall be known as the 'laboratory building' and shall be used for a clinical laboratory and administration and such other purposes as the needs of the medical college shall require" may properly be embraced within the title and does not violate section 11, art. III of the constitution, providing, "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed*.

Tibbets & Anderson, for appellant.

W. G. Hastings and *H. H. Baldrige*, contra.

LETTON, J.

The legislature of 1911 passed an act entitled "An act to appropriate \$100,000 for the construction and equipment of a laboratory building on the campus of the Medical College of the University of Nebraska at Omaha under the supervision of the Board of Regents." Laws 1911, ch. 205. The regents of the university were proceeding to carry out the purposes of the act when this action was begun to enjoin the defendant as Auditor of Public Accounts from allowing any claims against the appropriation. A demurrer to the petition was sustained by the district court, and the cause dismissed. Plaintiff has appealed.

The plaintiff contends that the act constitutes special legislation; that it violates section 11, art. III of the constitution, relating to the amendment and repeal of statutes; that the title of the act is restrictive and that the act is broader than the title.

1. The petition alleges that the purpose and effect of the act is to appropriate money for the purpose of promoting and establishing an exclusively allopathic school of medicine, and, hence, that it is a special act. We find nothing therein which relates to the establishment of an allopathic school, and there is no direction of any kind to the regents of the university as to whether any particular school, or whether professors or practitioners giving adherence to the tenets or doctrines of any given sect or division of the profession, shall have the privilege of inculcating its peculiar ideas in the building provided for. The whole matter is within the discretion of the board of regents, and if in the use of the building they violate no provision of the constitution or of the statute, no one can complain. While it is alleged that this is the purpose of the act, the allegation is mere surplusage, since it is clearly beyond the power of the court to inquire into the springs of legislative action. With inquiries as to the hidden motives prompting the enactment of laws or the wisdom of legislative measures, the courts can have nothing to do. Moreover, the prohibition against the legislature enacting local or special laws is not general, but is confined to the specific cases mentioned in section 15, art. III of the constitution. It is within its power to legislate upon any subject not therein prohibited (*State v. Moores*, 55 Neb. 480, 489), and we find no prohibition in the clause mentioned against such an act as this.

2. It is next contended that the act is not complete in itself but is amendatory of the general act governing the state university; that the constitutional provision, "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed"—is mandatory and must be complied with, and that repeal by implication is not favored by the law. In accordance with the provisions of section 10, art. VIII of the constitution, establishing the University of

Nebraska, and providing for the creation of a Board of Regents for its government, the legislature in 1869 passed an act establishing the university, providing for its government, describing the departments into which it might be divided, setting apart lands for a model farm, specifically stating the general powers of the board of regents, providing for funds for the support of the institution, giving the regents control of the designs and plans for buildings for the university, and providing, "The several buildings of the university shall all be erected within a radius of four miles from the state house." Laws 1869, p. 176, sec. 11. Plaintiff contends that the act under consideration changes and amends the act of 1869 with respect to the latter and other provisions controlling the erection of university buildings. *Smails v. White*, 4 Neb. 353, and a number of early cases in this court taking a rather narrow view of this constitutional question are cited by the plaintiff. We think, however, that the act is complete in itself and does not transgress these provisions of the fundamental law.

The act of 1869, which established the university and created its governing body, conferred upon that body certain specified powers and duties, and prescribed certain limitations. Among the powers granted was the control of the erection of buildings; among the limitations was that such buildings should not be erected more than four miles from the state house. We think it cannot with reason be contended that the legislature has not the authority to enlarge by a separate and subsequent act the powers and duties of any officer of its own creation, nor that it cannot widen or relax by later enactments any building limitations it may have established. The provisions of the general act limiting the powers of the regents with regard to the erection of other university buildings was not interfered with by the new act, but it conferred additional powers and prescribed a definite location for another building; while, in some sense, supplemental to the former act, it leaves its general provisions

untouched and therefore is not amendatory in the proper sense. It is true that for the control and management of the medical school reference must be made to the powers given in the general act, but this feature of itself does not operate to make this act amendatory. Where an act is complete within itself, it may be valid even though in conflict with a prior law not referred to in the later act. *State v. Cornell*, 50 Neb. 526; *Affholder v. State*, 51 Neb. 91; *Zimmerman v. Trude*, 80 Neb. 503; *Allan v. Kennard*, 81 Neb. 289; *State v. Ure*, ante, p. 31.

3. It is next argued that the act is broader than its title, in this, that the title of the act is "An Act to appropriate \$100,000 for the construction and equipment of a laboratory building," etc. Section 2 provides that "said building shall be known as the 'laboratory building' and shall be used for a clinical laboratory and administration and such other purposes as the needs of the *medical college shall require*." The argument is made that, since the title is restricted so that it applies to a "laboratory building," it cannot include the broader and more comprehensive provision in section 2 that it shall be used for administration and other purposes, as well as for a laboratory; that at the time of the passage of the act the regents of the university were carrying on the clinical laboratory work of the medical college of the state university at Omaha, and were carrying on the administrative and all other work at the university in Lincoln, and therefore that the public would be deceived by the title as to the object of the bill. We are not inclined to take such a narrow and restricted view. Even if no express words permitting the use of the building for administrative and other purposes connected with the needs of the medical college had been used in the act, we are of opinion that its use for such purposes as are incidental to its main purpose as a clinical laboratory might properly be permitted by the board of regents. It would seem to be an unreasonable construction of such a constitutional provision to hold that, when the legislature authorized the board of regents

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to erect a building, it should be compelled to specify in the title of the act and in minute detail each and every purpose for which the building should be used incidental to the main object, at the penalty of having the act declared invalid if this were not done. This would be carrying refinement to excess. *Bonorden & Ranck v. Kriz*, 13 Neb. 121; *Affholder v. State*, *supra*; *State v. Stuht*, 52 Neb. 209; *Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co.*, 45 Neb. 884; *Alperson v. Whalen*, 74 Neb. 680.

The constitutional provisions herein treated of have been recently considered in the opinion in *State v. Ure*, *supra*, to which we refer, in order to avoid useless repetition as embodying our views at greater length.

Finding no error, the judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

STATE, EX REL. J. HERMAN KRITTENBRINK, APPELLEE, V.
CHARLES W. WITHNELL, BUILDING INSPECTOR OF THE
CITY OF OMAHA, APPELLANT.

FILED MARCH 26, 1912. No. 16,600.

1. **Municipal Corporations: ORDINANCES: VALIDITY: EVIDENCE.** To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
2. ———: ———: ———: **PRESUMPTIONS.** In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
3. ———: **POLICE REGULATIONS.** In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.

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4. ———: ———. Within constitutional limits, private property is held subject to proper rules regulating the common good and the general welfare of the people. .
5. ———: ———. In testing police regulations, the court should inquire whether they have some relation to the public health, safety or welfare, and whether such is in fact the end sought to be attained.
6. ———: ———: NUISANCES. While a city having authority "to define, regulate, suppress and prevent nuisances," cannot arbitrarily prohibit harmless and inoffensive private enterprises by the exercise of such power, the acts of the city council in dealing with nuisances may be held conclusive, if the subject of legislation might or might not be a nuisance, depending upon conditions and circumstances.
7. ———: ———. The passing of an ordinance forbidding the construction of brick-kilns in a city may be a valid exercise of police power.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed.*

Harry E. Burnam, I. J. Dunn, John A. Rine and Clinton Brome, for appellant.

H. C. Murphy, S. L. Winters and R. E. McNally, contra.

ROSE, J.

This is an application for a writ of mandamus commanding defendant, as building inspector of Omaha, to issue to relator a permit to construct a brick-kiln on a tract of land owned by him in that city. Defendant had refused to issue the permit because he could not do so without violating an ordinance declaring: "It shall be unlawful for any person, persons, firm or corporation to erect or construct within the city of Omaha any kiln or oven to be used in the manufacture of brick." The trial court held, in harmony with the views of relator, that the ordinance was arbitrary, unreasonable and void, as being an invasion of personal rights and of private property. The writ was allowed, and defendant has appealed.

To establish the invalidity of the ordinance relator adduced proof tending to show: He is the owner of six and a half acres of land situated in the outskirts of Omaha, in the immediate neighborhood of a dairy and a pasture, remote from the densely populated portions of the city. He planned to construct and operate on the premises described a modern kiln, different from that formerly used in the manufacture of brick. According to his summary of the proofs relating to the new method, the brick-kiln "is nowise harmful to health or vegetation, produces little or no smoke, no deleterious gases, no obnoxious odors, and is not a rendezvous for vagrants and tramps." It is argued by relator that the contemplated enterprise at the place described would not be a nuisance *per se*, and that the city had no authority to interdict it as such. Had the city power to pass and enforce the ordinance?

By charter the state legislature delegated power to the city of Omaha in the following terms: "To make and enforce all police regulations for the good government, general welfare, health, safety and security of the city and the citizens thereof;" and "to prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits;" and "to define, regulate, suppress and prevent nuisances." Comp. St. 1911, ch. 12a, sec. 144, subds. XXV, XXXII, and sec. 52. Under the authority thus conferred, the city council in passing the ordinance obviously intended to exercise the police power of the city, and the courts should not interfere with its enforcement unless its unreasonableness, or the want of a necessity for such a measure, is shown by satisfactory evidence. *Peterson v. State*, 79 Neb. 132. It will be presumed that the city council in passing the ordinance acted with full knowledge of the conditions relating to the subject of brick-kilns located within the city limits. The reasons of public policy which prompted the city lawmakers to pass the ordinance may not appear on the face of the legislation, or in relator's petition, or in the evidence adduced at the trial of this case. *Gardiner v. City*

of *Omaha*, 85 Neb. 681. The inquiry, therefore, is not necessarily limited to the city's authority to prevent or abate nuisances, but extends to every phase of police power delegated in any form to the municipality. In *State v. Drayton*, 82 Neb. 254, a well-established doctrine was announced in this form: "Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised." Relator's land in Omaha is held subject to proper rules regulating the common good and the general welfare of the people of that city. *Wenham v. State*, 65 Neb. 394. In testing police regulations like the ordinance assailed, the court should inquire "whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." *Smiley v. MacDonald*, 42 Neb. 5; *In re Anderson*, 69 Neb. 686; *Union P. R. Co. v. State*, 88 Neb. 247. According to the principles of law to which reference has been made, relator was not entitled to a writ commanding defendant to issue a building permit in violation of the ordinance, unless the proofs clearly answer those inquiries in the negative and show that the enactment was an unreasonable and arbitrary invasion of individual rights under the guise of police regulation. *Wenham v. State*, 65 Neb. 394; *Union P. R. Co. v. State*, 88 Neb. 247.

Relator has not yet constructed his kiln, and the testimony adduced to show that it would not become a nuisance is based largely on observations of existing kilns operated according to the modern method described in his plans and evidence. According to the proofs the volume and character of the smoke will be less objectionable under the new process, but the stack will emit smoke of a light color continually. The fair inference from all the evidence is that black smoke in great volume will escape at intervals under ordinary management of the plant. It is undisputed that clay, excavated on the premises, and

coal, ashes and brick, in vast quantities, will be handled there. Teams and men will be required for that purpose. The fact that the wind in this climate will carry dust and soot long distances at times cannot be disproved. On one side of the kiln site an addition to the city is rapidly being occupied by valuable residences and there is no factory in the immediate neighborhood. The proofs show that there are 13 houses within two blocks of relator's land, and a witness for defendant testified that within 5 blocks there were 20 or 25 families. Smoke alone may amount to a nuisance, where it materially interferes with the comfort of human existence in the house and grounds of the owner, though they are located near the edge of a city no great distance from smoke-producing factories. *Crump v. Lambert*, 3 Eq. Cas. (Eng.) 408. An ordinance "prohibiting the emission of dense smoke within the corporate limits of the city" has been held valid as a proper exercise of police power. *City of St. Paul v. Haughbro*, 93 Minn. 59; *City of Buffalo v. Ray Mfg. Co.*, 124 N. Y. Supp. 913; *City of Rochester v. Macauley-Fien Milling Co.*, 199 N. Y. 207, 32 L. R. A. n. s. 554. While a city, having authority "to define, regulate, suppress and prevent nuisances," cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police power may be held conclusive, if the subject of municipal legislation might or might not be a nuisance, depending upon conditions and circumstances. *Harmison v. City of Lewistown*, 153 Ill. 313; *North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207; *Bowers v. City of Indianapolis*, 169 Ind. 105; *City of Buffalo v. Ray Mfg. Co.*, 124 N. Y. Supp. 913; *Powell v. Brookfield Pressed Brick Tile Mfg. Co.*, 104 Mo. App. 713; *Kansas City v. McAleer*, 31 Mo. App. 433; *Lawton v. Steele*, 119 N. Y. 226. Brick-kilns are frequently condemned as nuisances and are proper subjects of police regulation. *State v. Board of Health*, 16 Mo. App. 8; *Kirchgraber v. Lloyd*, 59 Mo. App. 59; *Harley v. Merrill Brick Co.*, 83 Ia. 73. If a brick-kiln is in

fact a nuisance, modern methods of construction and careful operation are immaterial. *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. 713.

In the present case, it seems to be conceded that a brick-kiln is an inviting place for tramps in cold weather. While relator expressed the conviction that he could keep them away, there is nothing to indicate they would not be turned loose on the residents of the neighborhood in the outskirts of the city, where police protection may be inadequate. Near valuable residences relator intends to build a smoke-stack 130 feet high, and to remove clay to a depth not disclosed by his plans or evidence. The value of residence property in the neighborhood might be damaged by relator's enterprise. These were proper matters for the consideration of the city lawmakers. When the entire record is considered, the evidence does not justify a finding that the ordinance in question has no relation to the public health, safety or welfare, or that it is not a *bona fide* exercise of police power, or that it amounts to an unconstitutional invasion of relator's individual rights, or that it is arbitrary and unreasonable. In this view of the law and the facts, he has not made a case entitling him to the writ.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

JOHN M. QUICK ET AL., APPELLEES, V. MODERN WOODMEN OF
AMERICA, APPELLANT.

FILED MARCH 26, 1912. No. 16,657.

1. **Insurance:** BENEFICIAL ASSOCIATION: BY-LAWS: REPEAL. Minutes of the proceedings of the legislative body of a fraternal beneficiary association, by merely reciting that a section of the by-laws has been amended and repealed, do not prove that the provisions of the original section have been eliminated from the by-laws, where neither the original nor the amended section is disclosed.

2. ———: ———: ———: RE-ENACTMENT. The simultaneous repeal and re-enactment, in terms or in substance, of parts of a by-law of a fraternal beneficiary association preserve without interruption the re-enacted provisions of the original by-law.
3. ———: ———: ACTION: INSTRUCTIONS. Where defendant's pleadings and proofs in a suit on a fraternal beneficiary certificate tend to show that assured changed his occupation from painter to locomotive fireman, that he was killed while engaged in the duties of his new employment and that the change was made under conditions releasing defendant from liability under the terms of the insurance contract, it is error for the trial court to refuse an instruction that plaintiff is not entitled to recover, if the jury find the facts to be as stated.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

Talbot & Allen and Benjamin D. Smith, for appellant.

George W. Berge, contra.

ROSE, J.

This is an action to recover \$1,000 on a fraternal beneficiary certificate issued by defendant to Charles S. Quick, May 20, 1908. Assured died November 14, 1908. Plaintiffs are named in the certificate as beneficiaries. From a judgment in their favor defendant has appealed.

It was pleaded as a defense that assured's application for membership and the by-laws of the fraternity were parts of the insurance contract; that assured in his application stated he was a painter, and paid assessments at the agreed rate for that occupation; that he afterward entered the hazardous occupation of locomotive fireman without paying the increase for the extra hazard, and without complying with sections 16 and 17 of the by-laws which required him to procure from defendant a certificate covering the new risk; that he was killed while engaged in the performance of the duties of his new employment, and that on the facts stated defendant was, by contractual terms fully pleaded, not liable for the payment

of any insurance. In the reply plaintiffs pleaded that assured's application was written by agents of defendants; that in answer to a question asked by defendant's agent assured correctly answered that he was a locomotive fireman; that, personally knowing the fact, the agent incorrectly inserted "painter" in the application as the answer; that the rate required by defendant was paid and that section 16 of the by-laws relating to the increased rate to be paid by a locomotive fireman had been waived by defendant and had been repealed prior to the death of assured. The by-laws pleaded by defendant were introduced in evidence, and there is direct proof that assured, in making his application, was asked to state his occupation, and answered that he was a painter; that the answer as given was written in the application, which was signed by assured, and that he was in fact engaged in that occupation at the time. It is at least doubtful whether there is sufficient evidence in the bill of exceptions as it now stands to sustain a finding that the occupation in which assured was really engaged was not correctly written in the application as given by him. That he was killed when performing the duties of a locomotive fireman is shown by evidence not disputed.

Plaintiffs, in attempting to prove that sections 16 and 17 of the by-laws, which, if binding on assured, released defendant from the increased hazard of the changed occupation of locomotive fireman, if he engaged therein without paying the increased rate and without procuring a certificate covering the new risk, offered in evidence the following entries from the record of a meeting of the head camp, or defendant's legislative body, which convened in June, 1908, the action having been taken in considering the report of the law committee: "Reading Clerk: Section 16, beginning on page 17, is stricken out. There is a new section 16, or almost new, substituted for it. The question is now upon the adoption of section 16 as amended. All those in favor of the adoption of this section will vote aye, those opposed, no, and the section is

adopted. The Reading Clerk will read the next. Reading Clerk: Section 17, starting at the bottom of page 18. General Attorney Plantz: If there is no objection to section 17 as submitted by the law committee, we will consider it adopted. There is no objection and it is adopted."

It is contended by plaintiffs that sections 16 and 17 were repealed before assured was killed, and that therefore his beneficiaries did not lose their insurance, even if there was a violation of those by-laws. Plaintiffs' failure to prove that the original provisions relating to the increased hazard did not remain in the new enactments is a sufficient answer to this argument. The by-laws pleaded and proved by defendant were parts of the original contract of insurance and were made so by the terms of the contract itself. Having alleged in the reply that section 16 had been repealed and that the contract had been thus changed, the burden was on plaintiffs to prove facts showing that the original provisions relating to the hazardous occupation of locomotive firemen were not carried into the amendments. The simultaneous repeal and re-enactment of parts of a law, in terms or in substance, preserve without interruption the re-enacted provisions. *State v. McColl*, 9 Neb. 203; *State v. Bemis*, 45 Neb. 724; *Stenberg v. State*, 50 Neb. 127. Within the meaning of this rule, that part of the proceedings of the head camp introduced in evidence does not show that the provisions relating to the hazardous occupation of locomotive fireman were not continued without interruption in the amendments of sections 16 and 17. There is no other proof to show that those sections were unconditionally repealed in a form which eliminated the provisions relied upon by defendant. The amendments of 1908, however, are in the record, and it is unnecessary to determine whether they should be considered; but, if it were proper to resort to them to see what was in fact done by the head camp, they would show that the changes did not eliminate the provisions pleaded by defendant as a defense.

With the proofs in the condition indicated, defendant requested and the court refused the following instruction: "The jury are further instructed that the by-laws of the defendant society provide that engaging in or entering on, or continuing in, the occupation of railroad locomotive fireman by any beneficiary member of the society shall totally exempt said society from any and all liabilities to such member, his beneficiary or beneficiaries on account of the death of such member directly traceable to employment in such hazardous occupation, unless such member shall have complied with the by-laws of the defendant extending his certificate to cover the hazards of such occupation, and shall have made application therefor and paid the increased rate provided in the by-laws of members engaging in such hazardous occupations, and you are instructed that if you find from the evidence that the said Charles S. Quick, after signing the application herein, engaged in the occupation of railroad locomotive fireman, without having complied with the defendant's by-laws extending his certificate to cover the hazards of his occupation and without having made application therefor and paid the increased rate required by the by-laws for members engaging in such hazardous occupations, then you are instructed that the defendant herein would be totally exempted from any and all liability to such member, his beneficiary or beneficiaries on account of the death of such member directly traceable to employment in such hazardous occupation."

To make available to defendant the terms of its contract, as shown by the pleading and proof already outlined, the foregoing instruction, or one of similar import, was necessary. The failure to give it was prejudicial error for which the judgment in favor of plaintiffs must be reversed.

Other errors of which complaint is made will not likely recur in the further proceedings, in view of the discussion of the principal assignment, and will not be con-

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sidered further, since the judgment must be reversed for the error already pointed out.

REVERSED AND REMANDED.

REESE, C. J., not sitting.

JOSEPH SITTLER, APPELLANT, V. BOARD OF SUPERVISORS OF
CUSTER COUNTY ET AL., APPELLEES.

FILED MARCH 26, 1912. No. 16,615.

1. **Highways: LOCATION: DAMAGES: WAIVER.** "Where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives all objections on the ground of irregularities in locating the road." *Davis v. Commissioners of Boone County*, 28 Neb. 837.
2. ———: ———: ———: **INJUNCTION.** "Before a county can appropriate lands to public use for a public road it must provide for the payment of damages for the right of way either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure, and the landowner may enjoin the use of his property by the public until such compensation is made." *Zimmerman v. County of Kearney*, 33 Neb. 620.
3. ———: ———: **PAYMENT OF DAMAGES.** By the amendment, April 5, 1909, of section 6157, Ann. St. 1907, it is required that "all damages caused by the laying out, altering, opening or discontinuing any county road shall be paid by warrant on the general fund of the county in which such road is located." Laws 1909, ch. 115.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Sullivan & Squires, for appellant.

N. T. Gadd, A. R. Humphrey and Alpha Morgan, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Custer county, to restrain the board of supervisors and other

officials from going upon his land for the purpose of laying out a public road, and, from a judgment of the district court of that county dismissing his suit, he prosecutes this appeal.

The petition shows that a petition for the laying out of the road in controversy was filed April 19, 1909; that the proposed road runs through the land of plaintiff; that after such petition had been filed plaintiff procured and filed a remonstrance against the establishment of the road, signed by 200 electors of the county; that, when the matter came on regularly to be heard by the board, the remonstrance was overruled; that the board and the county clerk are about to direct the surveyor to go upon his land, to survey the same; that the board made an order allowing plaintiff certain damages, but directed that the same be paid by road district No. 4 of Custer county, through which it is proposed to run the road, and refused to allow such damages against the county. The petition contains certain other allegations which we deem it unnecessary to recite.

The stipulation of facts shows that the petition for the road was filed April 19, 1909; that personal notice was given to the owners of the various tracts of land, including plaintiff; that on June 25, 1909, the remonstrance, hereinbefore referred to, was filed; that on the 11th day of August, 1909, the board met in regular session, all members being present, and the parties interested in the road controversy were also present; that testimony was submitted for and against the establishment of the road; after which the committee made the following report: "We, your committee, recommend that the petition be granted as recommended by the commissioners, and the remonstrance be rejected and damages allowed against road district No. 2 Kilfoil township as follows: * * * Joseph Sittler for land, 6.04 acres, \$302; for fences, \$108;" that the report of the committee was accepted and adopted as read and the road established as recommended by the committee. It is further stipulated that it is the inten-

tion of the defendants, or those authorized so to do, to go forward and take possession of plaintiff's land, for the purpose of the road as charged in the petition, and that Custer county is under township organization. It is also stipulated that plaintiff filed a claim for damages with the board in the following language: "Comes now the undersigned, Joseph Sittler, who with others signed and filed a remonstrance against the said proposed road, in which they set out fully their objection to said road, and without waiving any of his objections to said proposed road and all the while insisting upon the same, alleges that in the event the said road is laid out he will be damaged in the following items and amounts, to wit:" For land taken \$700; for fencing \$320; "for maintaining gates, inconvenience, and for damages to the value of the remainder of said farm by reason of said road \$1,000." "The undersigned alleges that he is the owner of the west half of section 9, township 17, range 21, across which said proposed road runs and the aforesaid damages will accrue to said premises, and while the undersigned still objects to the laying out of said road, subject to the official action of said board on said remonstrance, he prays that in the event said remonstrance and his said objection to said road are overruled and said road is laid out he may be allowed damages as by the items set forth in the aggregate sum of \$2,020." It is further stipulated that on August 16, 1909, the county clerk duly notified plaintiff of the action taken by the board on August 11, and that plaintiff took no appeal from such action of the board and prosecuted no error proceedings therefrom.

It is contended by the defendants that, by failing to appeal or prosecute error proceedings from the action of the county board in laying out the road, and by filing with the board his claim for damages, he waived the right to question the regularity in any of the proceedings by the board. As to everything done by the board, except the allowance of the damages against the road district instead of providing for their payment by warrants on the

general fund of the county, we think the contention of defendants is sound and must be sustained. The rule must be considered as settled in this jurisdiction, that by filing a claim for damages in such a case the claimant waives all objections to the location of the road. As said in *Davis v. Commissioners of Boone County*, 28 Neb. 837: "He, in effect, says to the defendants, 'You have taken my land for a public road and I demand damages therefor.' These he is entitled to recover, but the filing of the claim is a waiver of irregularities in locating the roads." But, plaintiff says, that rule should not be applied to him, for the reason that he at all times stood objecting to and resisting the establishment of the road; that it was not inconsistent for him to say to the board, "While I remonstrate against, object to and resist the establishment of the road, yet if you are determined to lay out the road, and if in spite of my objection the road is laid out, my damages are so much." We cannot agree with counsel that this language was sufficient to avoid the waiver.

The second point urged by plaintiff, that no provision was made for the payment of plaintiff's damages, stands upon a different footing. Giving the waiver the full force claimed for it by defendants, it simply sustains the regularity of all the proceedings of the board in laying out the road; so that, up to that point, the case stands as if no remonstrance or objections of any kind had been filed. In such a case, the county has a right to take the land for the proposed road, but not until it has made provision for the payment of the damages. In *Zimmerman v. County of Kearney*, 33 Neb. 620, we held: "Before a county can appropriate lands to public use for a public road it must provide for the payment of damages for the right of way either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages upon which a warrant may be drawn. In either case the compensation must be sure, and the landowner may enjoin the use of his property by the public until such compensation is made." In the opinion it is

said: "It is conceded that no attempt has been made to levy taxes to pay the damages in question, nor is it proposed to levy any for that purpose. If we understand the position of the defendant in error, it is that the plaintiff must give up his land and take the chances of recovering payment therefor. This is not the law. The rule as stated in *Republican V. R. Co. v. Fink*, 18 Neb. 82, is applicable in case of a municipal corporation, with this exception, that, where the damages have been allowed and taxes levied to pay the same so that warrant may be drawn thereon, the levy constitutes a fund that is available to the landowner and the property may be appropriated therefor. In other words, the proper authorities must be able to deliver to him a warrant drawn upon the proper levy before the public can appropriate his property to its use. This is the means by which public corporations, like counties, townships, etc., effect payment. There must be an absolute provision for payment, however, or the property cannot be appropriated. Here there is no such provision, and the landowner may enjoin the proceedings." The language of Mr. Justice MAXWELL in that case seems to exactly fit the case at bar. The judgment of the board was that the damages should be "allowed against road district No. 2 Kilfoil township." Even if prior to July 1, 1909, the board might have made such an order, by reference to chapter 115, p. 450, laws 1909, it will be seen that on April 5, 1909, an act was approved which amended the law as it had theretofore existed, so as to read as follows: "All damages caused by the laying out, altering, opening or discontinuing any county road shall be paid by warrant on the general fund of the county in which such road is located, except as otherwise provided in section 6091 of Cobbey's Statutes for 1907." Section 6091, referred to, is the one giving the right of appeal by an applicant for damages. Prior to this amendment of 1909, which became effective in July of that year, it was optional with the county board whether the damages should be paid by a warrant drawn upon the county or by the dis-

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trict, but the effect of the amendment referred to was to substitute the word "shall" for the word "may." As the action of the board was taken only a little over a month after this amendment became effective, it is more than probable that the board did not know of the change in the law. However that may be, the fact remains that the defendants are now threatening to go upon and take plaintiff's land and cause him more or less serious damage without having made any provision for the payment of his damages by the appropriation of money from any proper fund for that purpose. This cannot be done.

The judgment of the district court is therefore reversed and the cause remanded, with directions to grant an injunction restraining the defendants from entering upon or in any manner attempting to appropriate plaintiff's land until it has made due provision for the payment of the damages allowed in its order of August 11, 1909.

REVERSED.

HORACE W. PARSONS, APPELLEE, v. THEODORE F. BARNES
ET AL., APPELLANTS.

FILED MARCH 26, 1912. No. 16,633.

1. Petition discussed in the opinion, *held* to state a cause of action for damages for fraud.
2. Evidence examined and considered in the opinion, *held* sufficient to sustain a verdict in favor of plaintiff for such damages.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Edward F. Pettis, Theodore F. Barnes and Charles O. Whedon, for appellants.

T. J. Doyle and G. L. De Lacy, contra.

FAWCETT, J.

Plaintiff paid \$200 for what he supposed was a piece of soldiers' additional homestead scrip entitling him to enter 40 acres of government land. The scrip proved to be worthless and the money paid therefor was never returned. Plaintiff charges his loss to the fraud of defendants and this is an action to recover from them resulting damages. Trial to a jury. Verdict in favor of plaintiff for \$371.75. Defendants appeal.

Plaintiff was a dentist residing at Wamego, Kansas. Defendant Theodore F. Barnes was engaged in buying and selling soldiers' scrip, having an office at Lincoln, Nebraska. The Lincoln Safe Deposit & Trust Company, defendant, was transacting at Lincoln, Nebraska, the business indicated by its name, and defendant William E. Barkley, Jr., was its managing officer. The petition alleges: Defendants were partners in the business of buying and selling soldiers' scrip. For the purpose of locating 40 acres of land in Pottawatomie county, Kansas, plaintiff wrote to Barnes in April, 1901, to send him soldiers' scrip. What purported to be a 40-acre scrip of John W. Bowman, assigned to plaintiff by Barnes, was sent to the First National Bank of Wamego, Kansas, by the trust company and Barkley, with instructions to collect \$200 from plaintiff therefor. The scrip was represented by defendants to be valid. By means of a draft, payable to the trust company, plaintiff, through the National Bank of Wamego, paid defendants \$200. The draft was cashed and the money kept and appropriated. Believing the scrip to be valid, as it was represented to be, plaintiff went to the United States land office at Topeka for the purpose of locating 40 acres of land, but failed. The scrip was of no value. Bowman was not entitled to any additional entry under the United States land laws. The scrip was fraudulent and defendants had no right to make any entry thereunder. Defendants, well knowing that the scrip was fraudulent, and with the pur-

pose of cheating and defrauding plaintiff out of \$200, entered into a conspiracy and induced him to buy the scrip and to pay that sum therefor. Plaintiff returned the scrip to the trust company December 6, 1901, and demanded of defendants the return of his money. The scrip has not been returned to plaintiff nor the money refunded.

The alleged partnership and conspiracy of defendants and all allegations charging them with fraud are denied in the answers. In addition, Barnes alleges that plaintiff bought the scrip after satisfying himself upon a full examination of its value and validity. Barkley and the trust company allege that they had no connection with the transaction, excepting as the collection agents of Barnes, and that they had no other interest in the scrip or in the proceeds of the sale.

The principal points relied upon for a reversal are the insufficiency of the petition to state a cause of action and failure of the proof to support the verdict.

One of the objections to the petition is that it does not allege that plaintiff relied upon any representation of any of the defendants. The allegations of the petition must be construed with reference to the acts of congress creating soldiers' additional homestead rights and authorizing the transfer thereof. 2 U. S. Comp. St., secs. 2304, 2305. Every soldier who is entitled to the benefit of the act, if he has entered less than 160 acres of land, is permitted to enter so much more as, when added to the quantity previously entered, shall not exceed 160 acres. By an amendatory act, a right to the additional homestead was made transferable. It thus appears that scrip, representing a fractional part of 160 acres as a soldiers' additional homestead right of entry, is valuable only for a specific purpose. It is not like ordinary personal property, and, unless it can be used for that purpose, it is absolutely worthless as a lawful investment. The petition shows that plaintiff applied for scrip to be used in locating 40 acres of government land. Valid scrip only would answer that purpose. When defendants sent the scrip to the Kansas bank, with

a demand for \$200 upon its delivery to plaintiff, the law implied what is alleged in the petition, namely, that defendants represented it to be valid for plaintiff's purpose. It is further alleged that plaintiff believed that the scrip was what it was represented to be; that it was valid scrip; that he went to Topeka to locate land under it, but could not do so; that he was induced to pay \$200 therefor, defendants well knowing that it was worthless. If the petition does not allege in direct terms that plaintiff relied upon the representation of defendants, it does allege facts from which such reliance is fairly shown. Besides, there was a long trial, in which that issue was contested, We do not think defendants were misled or their rights prejudiced by reason of any imperfection in the plea of plaintiff's reliance upon the representation of defendants.

The petition is also challenged upon the ground that it contains no allegation of fact to show why the Bowman scrip was of no value. This point seems also to be without merit. It is alleged that "Bowman was not entitled to any additional entry under the United States land laws as a soldier." In connection with other facts stated, and in view of the acts of congress to which we have already adverted, this is a sufficient averment that Bowman had previously entered 160 acres of land and therefore could acquire no further rights to government land.

We do not think the verdict should be set aside as not being sustained by the evidence. A partnership was alleged. Barnes was engaged in selling scrip. Barkley admitted that the trust company had possession of the Bowman scrip, that he sent it to the Kansas bank to be delivered upon payment of \$200, that he collected that sum from plaintiff, that he was the managing officer of the trust company and that the Bowman scrip was returned to the bank.

It is shown that three pieces of scrip were sent to plaintiff. The first was the Bowman scrip. The second was the Maxwell scrip, and, though worthless, plaintiff was asked to accept it in place of the former one. The third

was described as the Ellis scrip, and purported to represent 80 acres, though it was worthless except for 40 acres. Plaintiff testified that after he had returned the Bowman scrip and after he had returned the Maxwell scrip in February, 1902, he visited Lincoln and had a conversation with Barnes, whom he met on the street, and with Barkley. The conversation with Barkley took place in the office of the trust company. In testifying to the conversation with Barkley, he said (the questions being omitted): "We had considerable conversation. I asked them with regard to Mr. Barnes whether he had any money on deposit or not, and he told me that he did not have any on deposit. I asked him if he thought there was any way in which he thought I could make a collection from Mr. Barnes, and he said he did not think there was; that Mr. Barnes was not in a condition to pay me. Then I asked him if he had any scrip in the bank and he said that they had such scrip there, and he said the way that we do business is like this: The scrip is sent to the bank. It is sent out and collections made and money returned and each get their share of it. I had some conversation with him in regard to this piece of scrip of Maxwell's. I asked him what became of that piece of scrip. I asked him where Mr. Barnes usually sold this scrip, or what disposition he made of it. He told me that Mr. Barnes—that he had no right to let me know what Mr. Barnes' business was, or let me into the arrangements that Mr. Barnes had with other parties, and it was really none of my business."

This is the only direct testimony that defendants were in partnership for the division of profits, but it is at least to some extent corroborated by the testimony of Barnes, who stated in answer to questions that his recollection in the beginning was that the Bowman scrip came to Barkley as all others; that if any scrip came to him he immediately handed it over to Barkley and wrote the parties it was there; that he did not remember of remitting any money to Bowman for the scrip; that Barkley always did

the transmitting for scrip. He further testified: "Q. Now, you have stated that the matter of payment to the men from whom you bought the scrip, including Bowman, was left to Barkley and that he alone could tell about that. Now, in each of these cases did Barkley retain the amount of money you had agreed to pay to the men you had bought the scrip from? A. He kept out his charges and all other charges that were against the claim. Q. Including the price of the scrip itself? A. Yes, sir; that I was paying to the men."

When the Ellis scrip was sent to the Kansas bank, plaintiff garnished it to satisfy his claim for \$200. It is apparent that he could not apply the scrip to that purpose, because it did not belong to Barnes or to the trust company or to Barkley. When this matter was in controversy, Barkley, as the officer of the trust company, wrote to the banker in Kansas that Barnes had no interest whatever in the Ellis scrip and employed counsel to defend the suit. Acting in like manner, he tried to induce plaintiff to take three separate pieces of scrip, two of which were worthless, and the third not being as represented. In each instance the soldier had been paid nothing. The record shows that the trust company, which is not a bank and does not receive deposits, collected in advance the money for the scrip, when sold. In all of these three cases nothing had ever been paid to the soldier whose scrip was being handled. It is difficult to understand the denial by Barkley of all interest except as a collecting agent. In the matter of the Bowman scrip he performed a great deal of service for a collection fee of one dollar, which is the amount he credited to the trust company on its books. The circumstances shown, in which all three of the defendants participated, tend to prove a greater interest of the trust company and Barkley than that of mere collecting agents. The testimony is scattered through 500 pages, and direct evidence, other than that referred to, outside of the facts themselves, is not found in the bill of exceptions. If these circumstances

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and the direct testimony of plaintiff, corroborated by the indefinite testimony of Barnes, do not show fraud and a combination of the three defendants, then the evidence does not sustain the verdict. The jury, however, found it was sufficient, and the district court refused to disturb their finding. We must also refuse.

AFFIRMED.

REESE, C. J., not sitting.

RALPH B. WELLER ET AL., APPELLEES, V. THOMAS L. SLOAN,
APPELLANT.

FILED MARCH 26, 1912. No. 16,647.

1. **Appeal: MOTION FOR NEW TRIAL.** This court will not review alleged errors occurring during the trial of a cause in the district court, unless a motion for a new trial was made in that court and a ruling obtained thereon. *Jones v. Hayes*, 36 Neb. 526.
2. ———: **AFFIRMANCE.** And in such a case, where the judgment is sustained by the pleadings, it will, ordinarily, be affirmed.

APPEAL from the district court for Thurston county:
GUY T. GRAVES, JUDGE. *Affirmed.*

Thomas L. Sloan and Herman Freese, for appellant.

Howard Saxton, contra.

FAWCETT, J.

This action was commenced in justice court to recover a balance claimed by plaintiff to be due from defendant on an account for lumber and coal. Plaintiff recovered in the justice court and defendant appealed to the district court, where plaintiff again recovered. The transcript shows the entry of judgment in the district court, January 8, 1910. Three days later, on January 11, 1910, defendant filed a motion for a new trial. This motion has never, so

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far as the transcript discloses, been submitted to or passed upon by the district court. The grounds urged by defendant in this court for a reversal of the judgment of the court below are all based upon the alleged errors set out in the motion for a new trial. That motion not having been presented to and passed upon by the court below, none of the errors therein assigned can be considered here. An examination of the pleadings shows that they are ample to sustain the judgment.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

LULU E. PITTS, APPELLANT, v. MARGARET J. BURDICK,
APPELLEE.

FILED MARCH 26, 1912. No. 17,012.

The petition shown in the abstract and set out in the opinion, examined, and held insufficient.

APPEAL from the district court for Hamilton county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Matters & Matters and J. H. Grosvenor, for appellant.

Charles P. Craft, contra.

FAWCETT, J.

From a judgment of the district court for Hamilton county, sustaining a general demurrer to her petition and dismissing her suit, plaintiff appeals.

The abstract of the petition, prepared and filed by plaintiff, shows that Charles B. Burdick, father of the plaintiff and husband of the defendant, being seized of certain real estate, died in 1902, testate; sets out the

second, third and sixth paragraphs of the will of the deceased, which, it states, was duly proved and probated in the county court of Hamilton county. It then sets out the substance of the remaining averments of the petition, which, aside from formal allegations, are that defendant claims to be the owner in fee of all of the property described in the will, and that she "threatens to sell, consume and dispose of all of said property in a manner unreasonable and injurious to the reversionary interests and rights of said plaintiff, and inconsistent and prejudicial to the intention of the testator." The prayer is for a construction of the will; for an injunction restraining defendant from disposing of the property "in a manner unjust and unreasonable and prejudicial to the interests of the said plaintiff and the intention of the testator," and that defendant be required to give security to insure plaintiff "the future enjoyment of her rights in said property, unimpaired and in accordance with the provisions of said will."

The general demurrer interposed by defendant admits every fact well pleaded in the petition; but when we eliminate the conclusions of law, which the demurrer of course does not admit, the petition is insufficient to entitle plaintiff to the relief demanded. That defendant has a perfect right to sell the real estate and convert it into money is conceded, and the allegation that she "threatens to sell, consume and dispose of all of said property in a manner unreasonable and injurious to the reversionary interests and rights of said plaintiff, and inconsistent and prejudicial to the intention of the testator," is a mere conclusion of law, and is too vague, indefinite and uncertain to warrant the court in requiring defendant, as a condition of her future enjoyment of the provisions made for her in her husband's will, to give security for the benefit of the plaintiff; a condition which, so far as the abstract shows, the deceased himself never imposed upon her.

AFFIRMED.

J. W. ADAMS, APPELLEE, v. VILLAGE BOARD OF CURTIS,
APPELLANT.

FILED MARCH 26, 1912. No. 16,765.

1. **Judgment: VALIDITY.** "The Village Board of the Village of Curtis" is not a person, natural or artificial, authorized by statute to sue and be sued in that name. A judgment nominally against a defendant not a person or entity competent to be sued binds no one.
2. **Appeal: DISMISSAL.** When an action has been begun in the district court naming "The Village Board of Curtis" as defendant, without naming any individual or person known to the law, either natural or artificial, as defendant, and judgment is entered therein, and upon appeal to this court in the name of "The Village Board of Curtis" the attorneys who took the appeal insist that there is no party defendant, and the appellee insists that the appeal is unauthorized, the appeal will be dismissed.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Dismissed.*

J. A. Williams, W. H. Latham and B. F. Butler, for appellant.

W. S. Morlan, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Frontier county to enjoin the opening of a street across lands which he claimed to own in the village of Curtis. The petition and summons named as the sole defendant "The Village Board of Curtis, Frontier County, Nebraska." An answer was filed in that name, and the cause was tried and judgment entered against the defendant named, granting the injunction as prayed. Afterwards an appeal was taken to this court in the name of "The Village Board of Curtis, Frontier County, Nebraska." In behalf of the appellant a brief was filed in which it was contended that, there being no defendant in the case, the whole proceedings are a nullity, and *Barbour v. Al-*

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bany Lodge, 73 Ga. 474, was cited, in which it was said: "No person being sued, no case was in court, and there was nothing to amend by." The plaintiff in the case filed a brief in which it is not seriously contended that an action can be maintained without a defendant, and no argument is advanced attempting to show that the defendant named here is a person or entity known to the law. The case of *Wabash Electric Co. v. City of Wymore*, 60 Neb. 199, is cited, in which it is held that, under some circumstances, an action may be maintained against a city or village and, under others, an action may be maintained against individuals who are members of the governing authorities of the city or village. The plaintiff in the brief accepts the contention made against the validity of the action, and answers it by saying that if there was no defendant there could be no appeal, and that by taking the appeal it is necessarily asserted that there is a defendant. There was no attempt or offer in any of the proceedings to bring in any party defendant, known to the law as an entity competent to sue and be sued, and, as we understand the briefs, the parties are substantially agreed that there is no judgment entered in the court below binding upon any person known to the law, and that there is no cause pending in this court between two persons or parties that are known to the law and competent on the one hand to sue and on the other to be sued.

Under those circumstances there is nothing for this court to do but dismiss the appeal, which is accordingly done.

DISMISSED.

HENRY E. LEWIS, ADMISTRATOR, ET AL., APPELLEES,
V. WILLIAM E. BARKLEY, JR., ADMINISTRATOR, ET AL.,
APPELLANTS.

FILED MARCH 26, 1912. No. 16,962.

1. **Wills: LEGACIES: INTEREST.** Whether interest is to be allowed upon a specific legacy of money depends upon the intention of the testator. If that intention cannot be otherwise determined from the language of the will itself, it will be presumed that the testator intended that the legacy should be paid during the first year after the appointment of the executor under the will, and, if not so paid, should bear interest from that time. *Smullin v. Wharton*, 83 Neb. 328, distinguished.
2. ———: ———: ———. If the will gives a specific legacy of money to each of three persons respectively, and expressly provides that two of such legacies shall not bear interest in any event, the presumption is raised that the testatrix intended that the third legacy not so limited shall bear interest.
3. ———: ———: ———. Section 282, ch. 23, Comp. St. 1911, provides: "That at the expiration of the year from the time of the granting of letters testamentary or administration, such executor or administrator shall at once, and the court is hereby directed to compel such executor or administrator to at once make final settlement of such estate." And, unless otherwise indicated by the will, the presumption is that the testator intended that the legacy should be paid within that time, and, if not so paid, should bear interest thereafter.
4. **Executors and Administrators: LEGACIES: INTEREST.** If the legatee in a will is also appointed by the will as executor thereof, and duly qualifies as such executor, the fact that he unnecessarily delays settlement of the estate and keeps in his own hands money derived therefrom will not estop him to claim interest on such part of his legacy as remains unpaid after allowing thereon all money received and not disbursed by him in the management of the estate, it appearing that the value of the estate has been enhanced rather than lessened by such delay.
5. ———: **ACCOUNTING BY LEGATEE AS EXECUTOR.** In such case it is the duty of the probate court, and of the district court upon appeal, to state the entire account of such executor, both as executor and as legatee under the will, charging against such legacy all money that he has received, less proper disbursements and commissions.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Tibbets & Anderson, for appellants.

E. F. Pettis and Greene & Greene, contra.

SEDGWICK, J.

This litigation arose out of the settlement of the accounts of John D. Knight, as executor of the estate of Helena V. W. Knight, deceased, his wife. Helena V. W. Knight died in 1898, and left a will which, among other things, bequeathed a legacy of \$10,000 to her husband, John D. Knight, and other property specified, and, after making some other bequests, the will gave all of the residue of her property, real, personal and mixed, to her said husband during his natural life, with remainder to various persons therein named.

John D. Knight entered upon the administration of the estate, and continued without any settlement until January, 1905, when he filed in the probate court of Lancaster county a report and account of his acts as executor of said estate. The residuary legatees under the will objected to the report, and afterwards it appears from the record that John D. Knight died, and Henry E. Lewis having been appointed administrator of his estate, the said Lewis was substituted as a party to the proceedings, and filed in the county court an application setting up the before mentioned legacy, and alleged that the same had been paid only in part. William E. Barkley, Jr., who had been appointed administrator of the estate of Helena V. W. Knight in the place of her husband, John D. Knight, filed objections to the application of Lewis as administrator, and the issues in the county court were made by this report of John D. Knight, and the application of the administrator of his estate afterwards appointed, and the objections of Mr. Barkley as administra-

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tor of the estate of Helena V. W. Knight. A hearing was had in the county court, and from an order entered thereon an appeal was taken to the district court for Lancaster county. In the district court the matter seems to have been heard on the issues as made in the county court. A jury was waived and the cause tried by the court. The issue, as stated in these various papers, is somewhat complicated and presents several matters of dispute between the parties. The district court in stating the account between the parties allowed interest upon the 10,000-dollar legacy. There had been no order made by the county court for the payment of this legacy, and it is contended that no interest can be allowed upon a legacy until such order is made. This presents the principal question discussed in the briefs.

In *Smullin v. Wharton*, 83 Neb. 328, the matter involved was not a specific legacy, but a provision of the will allowing annual support, and, the amount of such annual support having been fixed by the court, the question was whether interest would be allowed upon the unused portions of the amount so fixed. In discussing the question, however, the court referred to the rule in regard to interest upon specific legacies as applied in other jurisdictions, and stated that the rule of English courts in regard to an annuity payable from the body or principal of a fund seems to be that the first payment is due at the end of the first year after the death of the testator, but when payable out of the income of the fund it becomes due at the end of the second year; and points out that in Pennsylvania it has been held that such annuities become due at the end of the first year in either event. The opinion then states that there can be little doubt that "the general rule of law is that, in ordinary cases of legacies bequeathed, the legatee is entitled to interest at the legal rate from the time they could be legally demanded." It is then said that probably the rule is modified by the statutes of this state. The statutes are referred to, and it is said: "By these sections it would appear that none of the legacies

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are due and demandable until after the entry of the decree provided for, and therefore they could draw no interest prior to that date." The opinion does not regard it as necessary to determine that question in the case then being considered, but says: "If this be the case there could be no interest allowed in any event until after the termination of the litigation over the final admission of the will to probate and the necessary proceedings thereafter leading up to the decree." The question is disposed of "under the peculiar circumstances" of the case. The question here involved is not determined in that decision.

In the case of *Dickey v. Dickey*, 94 Fed. 231, the decided question is stated in the syllabus as follows: "A refusal to pay a legacy is not wilful and without reasonable cause, so as to entitle legatee to interest, where he claimed a larger sum than entitled to, and, on suit, was allowed only half of the amount claimed. If legacies bear interest within the provisions of Mills' Ann. St. sec. 2252, allowing creditors interest for all moneys after they become due, on any bond, bill, or promissory note or other instrument in writing, they do so only after an order of the court has been made directing their payment." In the majority opinion quotations are made from the statute of Colorado quite similar to those found in our statutes, and it is said that it is unnecessary to determine whether the statutes allow interest on legacies. The statement in the opinion that interest on legacies "can only be awarded as damages" is perhaps not in harmony with the authorities generally. Interest on legacies, like the legacies themselves, is to be allowed if the testator so intends, and the intention is to be derived from the construction of the whole will. Legacies, like promissory notes, may bear interest before they are due, if so intended by the testator. There is no express provision in our statute in regard to the matter. In doubtful cases as to the intention of the testator, assistance may be derived from the provisions of the statute in regard to the settlement of estates. The administrator is allowed in the first instance one year's

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time from his appointment in which to settle the estate (Comp. St. 1911, ch. 23, sec. 282), and the testator being aware of this statute, it has in most cases been regarded that there is a presumption that the testator intended that the legacy should bear interest from that time. In many cases this has been regarded as determining the matter when the intention of the testator cannot otherwise be drawn from the will. In the case at bar the will was generally in favor of the surviving husband of the deceased. He was given specified property and a specified amount as a legacy, and a life estate in all of the real estate of the deceased and the use and control of all the property during his life. The will gave specific legacies to other persons and expressly provided that the same should not bear interest, but no such limitation was placed upon the legacy in question to her husband. Mr. Knight qualified as executor of her estate and took possession of the property and appears to have used and treated it as his own. The real estate apparently was not very valuable at the time he qualified as executor, but was sold after his death for a considerable sum. It is contended, on the one hand, that he ought to have reduced the property to money and so have prevented any interest accumulating upon the legacy, and that his unreasonable delay in closing up the affairs of the estate was an injury to the parties interested, and ought to estop him and his estate to claim interest in the settlement of his accounts. On the other hand, it is insisted that he acted with great prudence in the interest of the estate in holding the property without sacrificing it, which resulted largely to the benefit of the residuary legatees. Other circumstances disclosed in the evidence are insisted upon by both parties as affecting the equities of their respective claims. If we consider all of the circumstances in the case, in the light of the general rule above stated, we think the fact that the will gives two other specific legacies with express provisions that "he (the executor) shall in no event allow any interest thereon" and that no such limitation is

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placed upon the legacy in question justifies the finding of the trial court that the testatrix intended that this legacy should bear interest after the first year of administration, if not realized during that time.

The trial court also was right in holding that it was the duty of the probate court, and of the district court upon appeal, to state the entire accounts of the executor with the estate, including his credits as legatee as well as his debits and credits as executor. The ancient rules derived from the technicalities of the common law forms of action are not applicable to our probate practice. In this state the county court applies equitable principles when necessary in the settlement of estates. The decision of the district court involved the examination of many items of account, and both parties seem to be somewhat dissatisfied with the results. Several of the items allowed in favor of the John D. Knight estate are criticised by the appellants, and many that are disallowed are insisted upon by the appellees. The district court appears to have made a very thorough investigation of the whole matter.

We do not consider it necessary to discuss the mass of evidence in regard to the many items criticised on each side of the account. Upon examination of the record, we find no reason to disturb the findings of the trial court upon any of these matters presented, and the judgment is therefore

AFFIRMED.

PLATTE COUNTY, APPELLEE, v. BUTLER COUNTY, APPELLANT.

FILED MARCH 26, 1912. No. 17,077.

1. **Counties: BRIDGE REPAIRS: LIABILITY.** When there is no contract between two counties to build or repair a bridge across a stream between them, one county cannot replace an old decayed wooden bridge, which it is dangerous to use, with a new steel structure

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of three times the cost, by replacing several spans at a time until the whole bridge is rebuilt, and recover the expense of so doing from the other county as repairs.

2. ———: ———: ———. If one county resolves upon such a course and proceeds to replace three wooden spans with steel at three times the cost necessary to rebuild them as originally constructed, there being seven or eight times that many spans in the entire bridge, it cannot recover from the other county as for "needed repairs."

APPEAL from the district court for Butler county:
GEORGE F. CORCORAN, JUDGE. *Reversed and dismissed.*

A. V. Thomas and L. S. Hastings, for appellant.

C. N. McElfresh, W. N. Hensley and Louis Lightner, contra.

SEDGWICK, J.

The plaintiff county recovered a judgment in the district court for Butler county upon an alleged claim for repairs of the bridge over the Platte river between the plaintiff county on the one side and the defendant county and Polk county on the other side, and the defendant has appealed to this court.

There has never been a contract between these two counties for the construction or repairs of this bridge. By sections 87-89, ch. 78, Comp. St. 1911, two counties may enter into a contract to build a bridge over a stream which divides the counties, and where such contract exists, if either county, after reasonable notice, neglects or refuses to build the bridge, the other county may build the same and recover a portion of expenses from the county in default; and where no contract exists between the counties, if either of them refuses to enter into a contract to repair the bridge, the other county may enter into such contract "for all needful repairs" and recover a portion of the costs from the other county. Under this provision the plaintiff county entered into a contract for work to put the bridge into condition for travel, and the defend-

ant county refused to pay any part thereof on the ground that the work done was not needful repairs, within the meaning of the statute. The plaintiff insists upon the application of the rule that, when each party requests the court to instruct in his favor, it amounts to a submission of the cause to the court for determination. This question, however, is not material, as in our view of the case the judgment is not supported by the evidence.

The question presented is whether this work was a part of a plan to build another and different bridge, or whether it was a needful repair of the existing structure. "Repair," as used in this statute, was defined in *Brown County v. Keya Paha County*, 88 Neb. 117: "The word 'repair' as applied to bridges in the road laws means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." And in *Colfax County v. Butler County*, 83 Neb. 803, it was held that "to build practically a new bridge" is not repairs. The evidence shows that the bridge in question was constructed 22 or 23 years before this work was done, and was entirely of wood and had needed repairs quite often. Mr. Smith, a member of the board of supervisors of the plaintiff county, testified that "the whole bridge was pretty much out of repair, * * * the superstructure of the lower part of the bridge was badly rotted, and there was lots of caps, piling and timber of that kind that was rotten clear through," and that, while such a bridge would not be expected to be serviceable for more than about 20 years (one expert witness testified "in the neighborhood of 12 years"), a steel bridge ought to last from 50 to 75 years. Another witness testified: "The bridge was in pretty bad condition in 1909, and outside of this south turn-out it was rotten and in bad shape, and the board as a committee had the idea, even though the bridge was temporarily repaired, that it could not stand very long on account of being in such kind of condition. We built the steel spans so that part of the bridge would stay, and in one sense we knew from the condition of the other part of the bridge that it would

not stay very long. It was my judgment and the judgment of the board that it couldn't stay very long after the old part of the bridge went away. We have, since the old wood bridge went out, put in steel spans clear across there, connecting with the three steel spans already put in under the guise of repairing the bridge." The length of the bridge was 1,945 feet, and they concluded to put in three new steel spans of 80 feet each, 240 feet in all. The cost of the three steel spans was over \$6,000, and these three spans could have been replaced with wood of a similar construction as the original bridge at a cost not exceeding \$2,000. We have seen that the defendant might be held liable for its proportion of the needful repairs of the old bridge, but it could not, under the law, be held liable to contribute to the construction of a new bridge. The defendant alleged, and the evidence shows, that the authorities of Platte county considered and determined that the bridge as a whole had become dangerous and unserviceable and that it was necessary to replace it with a new structure of steel. Instead of removing the old structure and building a new bridge of steel at once, they determined upon a plan of putting in these new spans of steel, to be followed by replacing the other spans of the bridge in a similar way, and so replacing the old bridge with a new bridge of steel. This plan was executed and they now have a new steel bridge. The plaintiff contends that this was a proper and economical thing to do, and says in the brief: "It seems to us that, in the nature of things in this case, circumstances require a substantial and lasting bridge in place of the makeshifts that have been used. The evidence at the trial was that 'the relative life of a wooden bridge is in the neighborhood of 12 years, while a steel bridge similar to these three steel spans ought to last 50 or 75 years.' It further appears from the abstract that the cost of a wooden structure similar to these three steel spans would be about \$2,000. It is, therefore, established that, while a steel structure costs three times as much as a similar wooden structure,

it lasts from four to six times as long. Therefore, so far as the question of economy goes, there can be no doubt that the board of supervisors of Platte county acted wisely and well in constructing the steel spans. It should also be borne in mind that necessity has changed since the erection of the old wooden bridge in 1871; for instance, the old horse-power threshing machine has given way to one propelled by a traction engine, weighing, perhaps, six times as much as the old horse-power. The pleasure vehicle of today is, in many cases, an automobile, weighing from one to two or three tons, instead of the carriage of our fathers." This reasoning is plausible, and we have no disposition to question its logic, but it should be addressed to the legislature. The legislature has not seen fit to allow one county to build a new bridge at the expense of another county, however desirable such a structure might be, and however much it might be in the interest of the people of both counties. To replace an old decayed wooden structure with a new, serviceable, economical steel bridge, at an expense of at least three times as much as the original cost of the wooden bridge so replaced, is not "needful repairs," within the meaning of the statute. In this view of the case it is not necessary to determine the question presented as to the sufficiency of the notice to the defendant county, and as to the true dividing line between the two counties, nor as to the proper construction of that part of the proviso of section 88, which limits the liability of the defendant county in any event to "such proportion of the costs of making such repairs *as it ought to pay*, not exceeding one-half of the full amount so expended," nor the effect, if any, that should be given to the fact that the plaintiff county has not paid for these repairs from its own funds, but from taxes levied upon the taxable property of the city of Columbus and Columbus township.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

REESE, C. J., not sitting.

TILTON-PHELPS FURNITURE COMPANY, APPELLEE, v. VERNE
J. WIAANT ET AL., APPELLANTS.

FILED MARCH 26, 1912. No. 16,601.

Evidence examined, and *held* to sustain the judgment of the lower court, which is affirmed.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

H. W. Short, for appellants.

W. C. Dorsey, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Franklin county by Fred G. Hutchins.

The plaintiff, the Tilton-Phelps Furniture Company, filed its petition in the district court for Franklin county against Verne J. Wiant, L. H. McClung and Fred G. Hutchins. The petition alleged that they were co-partners engaged in the business of selling furniture in the city of Franklin, Nebraska, under the firm name and style of V. J. Wiant & Company, and that on the 2d day of July, 1907, they purchased from the plaintiff goods, wares and merchandise of the reasonable market value of \$78.27, which were delivered to them, and for which amount the plaintiff prayed judgment, with interest. Hutchins filed a separate answer consisting of a general denial. Wiant answered for himself. He set up a general denial, and also pleaded that he was a minor under the age of 21 years, and that the goods alleged to have been sold never came into his possession or control, and that he never received any money or profit by reason of the purchase and disposal of the goods, and he alleged his minority as a defense to plaintiff's cause of action. The defendant McClung filed no answer, and was defaulted. At the trial the jury rendered a verdict against the de-

fendants McClung and Hutchins for \$82.30. The verdict is silent as to the defendant Wiant. Hutchins filed a motion for a new trial. The motion was overruled, and he appealed to this court.

It is contended by Hutchins that the evidence fails to show that the plaintiff shipped and delivered the goods. The defendant Wiant testified that Hutchins telephoned him to go up to Franklin and buy the McClung stock of goods, and that he went up and bought the goods and paid \$12 to bind the bargain; that afterwards Hutchins called him up and told him that he wanted the furniture store at Franklin run in his name, the name of V. J. Wiant; that under that arrangement McClung was to run the store and deposit the funds taken in for the sale of goods at the Franklin State Bank, at Franklin, and that all bills were to be checked out of the said deposit; that afterwards the original plan of running the business in the name of V. J. Wiant was changed, and that Hutchins told him that he (Hutchins) and McClung and Wiant should form a partnership, and that the store should be run in the name of V. J. Wiant & Company; that McClung was to receive one-third of the profits for his pay, and that the buying should be done by Hutchins from the wholesale houses, and that the goods should be shipped in the name of V. J. Wiant & Company to Franklin, Nebraska; that Hutchins should pay for the goods, and that the company should reimburse Hutchins out of the company funds; that Hutchins was to receive one-third of the profits and Wiant one-third of the profits, and that a bank account should be started in the name of V. J. Wiant & Company at the Franklin State Bank, and that all money received from the sale of goods should be deposited in said bank account; that McClung was to retain one-third interest in the stock, and that two-thirds of the purchase price was to be paid to McClung for the stock of goods on hand. He also testified to McClung and Hutchins being in the store at Franklin, and that McClung was selling and receiving goods, and the business was being conducted in

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the name of V. J. Wiant & Company. The testimony clearly shows that McClung and Hutchins were both engaged in the business. The bills of goods were made out to V. J. Wiant & Company. The testimony of Earl A. Lee seems to corroborate the testimony of V. J. Wiant. He testified that the goods were actually shipped on the date shown by the bill of lading over the Burlington railroad, and that the goods have never been returned. The evidence is sufficient that the goods were sold and delivered. Wiant testified concerning his minority, and that he had received no benefit from the business. The jury probably left his name out of the verdict because of his testimony touching these matters.

A careful examination of the evidence clearly shows that the defendants were liable, and the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF ISAIAH PAISLEY.

SUSIE M. PAISLEY, APPELLEE, V. FRANK PAISLEY ET AL.,
APPELLANTS.

FILED MARCH 26, 1912. No. 16,642.

1. **Wills: UNDUE INFLUENCE: TRIAL: INSTRUCTIONS.** The court instructed the jury: "You are instructed that the fact that the proponent, Susie M. Paisley, and the decedent, Isaiah Paisley, were married, is not of itself undue influence. The law encourages marriage between men and women, and the fact alone and of itself that these parties contracted and entered into marriage relations would not raise any presumption whatever of undue influence." *Held* improper under the evidence in this case, and probably misleading.
2. **Instructions numbered 1 and 2, requested by contestants, examined, and held applicable to the facts proved, and that it was prejudicial error to refuse them.**
3. **Wills: UNDUE INFLUENCE: EVIDENCE.** The evidence examined, and *held insufficient* to sustain the verdict and judgment.

APPEAL from the district court for Polk county., CONRAD HOLLENBECK, JUDGE. *Reversed.*

Mills, Mills & Beebe and E. L. King, for appellants.

W. M. Johnston and Matt Miller, contra.

HAMER, J.

On the 28th day of January, 1909, one Isaiah Paisley, of Polk county, executed a will by which he attempted to devise and bequeath all of his property, valued at about \$20,000, to the proponent. It appears that on that day, and just prior to the execution of the will, he married one Susie M. Cyphers. At that time the testator was 66 years old and was afflicted with certain maladies of which he died 38 days thereafter. Miss Cyphers was 40 years of age, a spinster in good health, and in the full vigor of middle life. The testator left surviving him his said wife, two brothers, three sisters, and certain children of two deceased brothers. After the death of the testator the widow, who was the sole devisee named in the will, presented it to the county court of Polk county for probate. The collateral heirs of the deceased contested the will on the grounds of the mental incapacity of the testator and undue influence on the part of the widow in procuring its execution. E. L. King, Esq., was appointed and appeared as guardian *ad litem* for the minors, Stewart Paisley and David Paisley. The contestants had the judgment in the county court, which denied probate of the will, and the proponent appealed to the district court. On the trial in the district court of that county the proponent had the verdict and the judgment, and the contestants have brought the case to this court.

The appellants contend that the verdict was contrary to and was not sustained by the evidence. It appears from the bill of exceptions, without dispute, that the testator, a bachelor 66 years of age, was married to the proponent on the 28th of January, 1909; that immediately following

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the marriage ceremony the bridal party, headed by an attorney, went to the office of Johnston & Ball in the town of Osceola, and the testator there executed the will in question, leaving all of his property, both real and personal, to his new wife to the exclusion of all of the contestants who were the natural objects of his bounty. It also appears that about three years before his marriage the testator had experienced a shock of paralysis which destroyed his physical health and to some extent impaired his mental faculties; that at the date of the marriage and for many months before that time Paisley was sorely afflicted with dropsy, rheumatism and other ailments to such an extent as to render him almost helpless; his feet, legs, generative organs and the lower part of his body appear to have been badly swollen so as to render him unable to properly dress his feet; his feet were so swollen that his shoes would not fasten. One of his sisters, Mrs. Lockard, seems to have looked after him and washed him and attended to his clothing. It appears beyond question that he could not, and never did, consummate the marriage relation with the proponent.

It was further shown that Paisley was introduced to the proponent by her sister, Mrs. Woodward, some time in the month of October preceding the marriage, and that from that time until after the ceremony took place Dr. Woodward, the brother-in-law of the proponent, was seen frequently with Paisley; that he often took him riding, and their relations seem to have been most friendly and intimate. At the trial Dr. Woodward testified that it was agreed between himself and the proponent that, if the marriage could be brought about and the will in question was made, then upon Paisley's death proponent was to pay him the sum of \$4,000. It must be said, however, that Dr. Woodward was fairly impeached and there was testimony that his reputation for truth and veracity was bad. Notwithstanding this, certain facts and circumstances were shown which tended strongly to corroborate his statements.

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It appears that Dr. Woodward was in the habit of taking Paisley into the country with him, and on these occasions he would talk to him about marrying Miss Cyphers, and would say to him that it would be no more than right and just for him to leave his estate to Miss Cyphers; that she loved him and cared for him. Woodward testified, and this is not disputed, that during the year previous to Paisley's death he (Woodward) saw Paisley nearly every day. On the morning of the day when the marriage took place he saw Paisley "about 15 minutes before he started to the county seat to be married." Woodward further testified that Paisley said to him that he was about to get married that day, "but I am not able, but I guess I will have to get married. I have told Miss Cyphers to put this off a while because my health is so bad, but Susie and your wife came to my house and said, 'If I didn't marry her at once, she would sue me for breach of promise.'"

The witnesses Brigham, Hanks, Hastert, Strain, Kinney, Stone, Anderson and Olson testified to Paisley's inability to express himself, and that he had difficulty in speaking. To the witness Cal White, the testator said that he did not think that he could live but a little while. He also said that he did not intend to get married, but that she insisted that they should, and that they were going to get married tomorrow. When the witness Joe Gubser shook hands with him at the court house and wished him much joy, Paisley said, "He didn't know whether there would be much joy the shape he was in." To witness Campbell he said, "Campbell, I am just all in." Paisley told the witness Lockard "that he hadn't intended to get married so quick; that Mrs. Woodward and Miss Cyphers came over to his place Sunday evening before this and talked it over and set the day for Thursday for the marriage, and that she had also threatened him with a lawsuit in case he went back on her and didn't marry her this time." He also testified that Miss Cyphers requested Paisley "to make her a trustee's deed to all of

his property." On the return of the party from Osceola on the day of the marriage, the testator immediately took to his bed, his ailments increased, and he died on the 7th of March following the marriage ceremony.

On the question of Paisley's mental condition and testamentary capacity, the evidence was conflicting; but it seems clear that however strong his mentality may have formerly been, his physical ailments were such that he was in a condition to be easily influenced and to fall an easy victim to the wiles of designing persons. It also clearly appears, considering his physical condition, that the proponent's motives in entering into the marriage relation with him could not have been the usual and proper ones of admiration, love and affection. She could have been prompted by nothing but a desire to obtain his property. She knew that in the nature of things Paisley had but a few days to live, and she no doubt concluded that she could, and would, endure him for a short time, although he must have been to her an object of disgust. Bearing upon the main question touching the question of undue influence by the proponent and her sister and Dr. Woodward, there was in evidence some statements made by the testator just prior to the ceremony which showed that he wanted to defer the marriage; but, because of the statement of the proponent that if he did not marry her he would be sued for a breach of promise, he hastened that event. It would seem to follow that the jury should have found that the will made by the testator was procured by means of undue influence on the part of proponent and her friends. The enfeebled condition of the testator is established by the testimony of all the witnesses who testify concerning the matter, and the evidence of Dr. Woodward concerning what he said and did to bring about the marriage is corroborated by the testimony of the witnesses Richard Clark, Ira Paisley, and the stipulation concerning the agreed testimony of John Fox. Undue influence and weakness of body and mind are often closely allied, and it may be difficult to tell exactly which

may have been the stronger factor in bringing about the result in any given case where the testator is enfeebled by illness, and has disregarded the natural objects of his bounty and has devised all, or the greater part of his property, to a stranger or to one whose integrity of purpose may well be questioned because of his conduct and his apparent self-interest as the chief beneficiary of the will, and because of his opportunity to exercise undue influence upon the testator. It is contended by the appellants that the evidence is insufficient to sustain the verdict. A careful reading of all the testimony contained in the bill of exceptions forces us to the conclusion that this point is well taken.

It is contended by the appellants that the court erred in instructing the jury as follows: "You are instructed that the fact that the proponent, Susie M. Paisley, and the decedent, Isaiah Paisley, were married, is not of itself undue influence. The law encourages marriage between men and women, and the fact alone and of itself that these parties contracted and entered into marriage relation would not raise any presumption whatever of undue influence." There is no doubt but that this instruction as an abstract statement is correct, but when given, as it was in this case, without explanation or modification so as to make it apply to the evidence and the conceded facts concerning the marriage, it must have been highly misleading and prejudicial and may have caused the jury to return a verdict for the proponent. The jury are told in the first sentence of this instruction that the fact that the Paisleys were married is not of itself any evidence of undue influence. The second sentence is the statement of justification, and that is, that the law encourages marriage between men and women; and then there is the statement that this fact alone and of itself does not raise any presumption of undue influence. The effect of this was to take away from the jury any consideration of the circumstances under which the marriage was contracted, the going over to the lawyer's office immediately after the per-

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formance of the marriage ceremony, and having the will executed there, and the physical condition of the man on the day of the marriage. This instruction was also misleading because it seems to proceed upon the theory that some one was objecting to marriage as if it was not honorable, and that it was the duty of the jury to stand up for marriage. There was no issue of that kind in the case. There was danger that this instruction might be construed by the jury as a sort of license to the proponent to get married to the testator in any way that she could bring it about, and regardless of his condition. The evidence seems to establish the fact that this woman of 40, in good health and having plenty of force, got control of the testator and rushed him along towards the culmination of her desires to be his wife in name, so that she might have his property in fact. It would seem to be proper to cite a few cases properly applicable to the consideration of this one.

In the case of *In re Estate of Frederick*, 83 Neb. 318, this court, by REESE, C. J., said: "The evidence shows a state of mind throughout his whole life on the frontier and while an inmate of the soldiers' home at Leavenworth, which on some subjects was irrational and unreasoning, and which from imaginary and unreal causes would cause him to forget his obligations to his daughter, who in later years was in absolute want, with a family upon her hands, and whose husband had died. In the will presented, and which was the last of a number of wills made, he without any known cause practically disinherited his daughter and cast nearly all of his property upon a stranger to whom he was under no obligations and in no sense related. The evidence shows that he had at times taken a dislike to his daughter and determined to furnish her no aid or assistance, but, upon discussing the matter with friends, would declare she was worthy of his bounty and should have his property. This inclination would soon disappear, and he would declare his determination to leave what he had to strangers." The will was rejected.

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In 1 Underhill, Wills, sec. 125, it is said: "The mental and physical capacity of the deceased is to be considered in determining what degree of influence will vitiate his will. * * * The will of one whose independence has been weakened by indulgence in dissipation, or whose stamina, physical or mental, has been broken by illness or old age, may be easily overcome. * * * *Every case depends wholly upon its own particular facts and attendant circumstances.*" Section 137: "The fact that the party superintending the execution of the will, or the person who propounds it for probate, takes a large benefit under it is a circumstance raising a suspicion of undue influence." Section 151: "Fraud employed in procuring a will, no less than coercion, may justify it being set aside. Both are equivalent to undue influence, and both are usually present in the same transaction." Section 148: "The motives that prompted the marriage upon the part of the proponent, the sickness and helpless condition of the testator at the time, the fact that the testator was an elderly man while the proponent was very much younger, the efforts of the proponent and of her parents and relatives to bring about the marriage, the poverty of the wife and the wealth of the testator, may all be considered on the issue of undue influence." *In re Estate of Wilcox*, 93 Mich. 438; *Reichenbach v. Ruddach*, 127 Pa. St. 564. Appeals to the affection and emotions of the testator, solicitation and persuasion may be carried to such a degree as to overpower his mind, and in such case will amount to undue influence. Page, Wills, sec. 128; *Higginbotham v. Higginbotham*, 106 Ala. 314; *Bevelot v. Lestrade*, 153 Ill. 625; *Rivard v. Rivard*, 109 Mich. 98; *Gordon v. Burris*, 141 Mo. 602; *Perritt v. Perritt*, 184 Pa. St. 131; *Orchardson v. Cofield*, 171 Ill. 14.

In *Orchardson v. Cofield*, *supra*, the court said: "It appears beyond cavil that Charles Orchardson entertained for this deluded old lady no single sentiment of affection or esteem, which must prompt every honorable marriage, and that he married her for money, and nothing else."

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The woman in that case was 83 and the man was 57. She was wealthy. He called himself "The Son of Wisdom." He wrote a book in which he flattered the old lady. She paid the expense of printing the book. The book, besides being written for the purpose of getting the old lady's money, was to reform the world.

The case of *Baker v. Baker*, 102 Wis. 226, is an instructive case touching the method of exercising undue influence upon the testator, as also concerning the proper rule applicable to all such cases.

In *Hampson v. Guy*, 64 L. T. Rep. n. s. (Eng.) 778, the court said: "I think the true result of the authorities is this, which has been already indicated by Lindley, L. J., that when you have a case of evidence tending to show some mental incapacity and also evidence tending to show undue influence, it is very much more easy to satisfy yourself that undue influence has been used where the mind of the person to whom it is addressed is evidently in a weak condition—two things which it was said here in the argument are almost inseparably connected—the amount of influence which would induce a person of strong mind and in good health to make a will according to the wishes of the persons who were attempting to induce such a testator must be very much greater than the amount of inducement which would improperly influence the mind of a person who was weak partly from mental infirmity and partly from ill health, as is the case here."

In *Hall v. Hall*, 18 L. T. Rep. n. s. (Eng.) 152, the testator told his brother, who was a witness in the case: "My wife is very vexed about the will I have made, and unless it is destroyed and a fresh one made she will give me no more rest." The husband wanted to make "peace and quietness" with her, but she was abusive and said of her husband "the black-looking thief has altered his will." The will was rejected.

In *Gordon v. Burris*, 141 Mo. 602, the evidence showed that the beneficiaries of the will, sons of the testatrix, were heard talking to their mother about making a will.

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They said to her that they three ought to have the property. While they were talking the father came in, and he said: "Mother is sick, don't bother her now." In that case the granddaughter, for whom the testatrix wished to provide, was left out of the will. The reviewing court held that there was evidence of undue influence.

In *Carroll v. Hause*, 48 N. J. Eq. 269, the court said: "Against a beneficiary having a testator under his control, with power to make his will, the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator."

In *Purdy v. Hall*, 134 Ill. 298, the court said: "Naturally, the mind sympathizes with the body in that which debilitates, and, even when not otherwise impaired, it may become so wearied from long continued, serious and painful sickness that it is willing to purchase rest and quiet at any price, and when in that condition it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation. The feebler the mind of the testator, no matter from what cause—whether from sickness or otherwise—the less evidence will be required to invalidate the will of such person."

In *Brown v. Fisher*, 63 L. T. Rep. n. s. (Eng.) 465, the court held, adopting the language of certain cases cited: "The rules of law, according to which cases of this nature are to be decided * * * are two: The first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator; the second rule is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument,

in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased." In that case there seemed to have been suspicious circumstances, and the court refused to probate the will, and on appeal from such refusal the appeal was dismissed.

In *Hegney v. Head*, 126 Mo. 619, the court held: "Where a will is made in favor of one's spiritual adviser to the total or partial exclusion of the testator's lawful heirs, the burden of proof is on the devisee to show that the testator possessed testamentary capacity and that the will was not the result of undue influence."

In *Sheehan v. Kearney*, 82 Miss. 688, it was held that the proponents of a will have the burden of proof both as to testamentary capacity and undue influence.

In *Whitelaw's Ex'r v. Sims*, 90 Va. 588, it was held: "The fact that the will of a person 88 years old differs from her previously expressed intention, and is made in favor of those standing in a relation of confidence and dependence toward her, raises a presumption of fraud and undue influence, which must be overcome by satisfactory testimony in order that the will may stand."

In *Miller v. Miller*, 187 Pa. St. 572, it was held: "In a contest over a will in which a son is largely preferred, if it appears that the son, although not the father's attorney, was his trusted and confidential agent, the burden of proof is on the son to rebut the presumption of undue influence."

It is further contended that the court erred in refusing to give to the jury instructions numbered 1 and 2, requested by the contestants. To quote them would perhaps unnecessarily extend this opinion, and it is sufficient to say that they seem to contain a fair statement of the law, that they were applicable to the facts as shown by the evidence, and that they should have been given.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

PHOENIX MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V.
CITY OF LINCOLN ET AL., APPELLANTS.

FILED APRIL 8, 1912. No. 17,450.

1. **Appeal: REMAND: NEW PARTIES: LAW OF THE CASE.** Where, upon an appeal to this court, a judgment of the district court is reversed and the cause is remanded with directions to bring in other and additional defendants for the purpose of enabling the court to determine the rights of all parties interested in the subject matter of the action, such order will be adhered to in all subsequent stages of the litigation.
2. **Municipal Corporations: CONSTRUCTION OF VIADUCT: ACTION FOR DAMAGES: JOINDER OF CAUSES OF ACTION.** A petition in an action for damages to abutting property caused by the construction of a viaduct upon a city street over and across the tracks of a railroad company is not vulnerable to the objection that two causes of action are improperly joined, because the city and the railroad are joined as defendants.
3. ———: ———: **LIABILITY FOR DAMAGES.** The provisions of article I, ch. 13, Comp. St. 1909, authorizing cities to require railroad companies to build viaducts over and across their tracks where they intersect streets and highways, are governmental in character, and the reasonable exercise of that authority creates no liability on the part of the city for damages to property abutting on such viaducts.
4. ———: ———: ———. Appraising the damages caused by the construction of a viaduct in accordance with the provisions of subdivision 3, sec. 129, art. I, ch. 13, Comp. St. 1909, does not of itself create a liability against the city for the payment of such damages, and where the city has in no way bound itself by contract or otherwise for such payment, no action can be maintained against it to recover the damages to property abutting upon the viaduct.
5. **Railroads: STREET CROSSINGS: DUTY TO MAINTAIN.** By the statutes of this state railroad companies, when they lay their tracks over and across public streets or highways, are charged with the duty of restoring such streets or highways to their former usefulness; and that duty is not discharged when a street or highway is restored to its proper condition at the time the railroads are constructed. The duty is a continuing one, and embraces such alterations and improvements as may afterwards be made necessary by the growth of the city and the increased travel.

6. ———: ———: CONSTRUCTION OF VIADUCT: LIABILITY FOR DAMAGES. In the performance of such duty railroads may be required, when necessary, to construct viaducts over and across their tracks, and are liable for damages to any person whose property is injured by such construction.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed with directions.*

Fred C. Foster, D. H. McClenahan, James E. Kelby, Byron Clark, B. H. Dunham, Hall & Bishop, F. A. Brogan and B. P. Waggener, for appellants.

Samuel J. Tuttle, contra.

BARNES, J.

On the former hearing of this case a judgment for the plaintiff was reversed, and the cause was remanded to the district court, with directions to make the railroad companies defendants, in order to enable the court to determine the question of the liability, as between them and the city of Lincoln, for damages to the plaintiff's property abutting upon what is known as the "Tenth street viaduct," caused by the erection of that structure. *Phoenix Mutual Life Ins. Co. v. City of Lincoln*, 87 Neb. 626. When the mandate was returned to the district court the plaintiff filed its amended petition; summons was issued thereon and served upon the railroad companies. They appeared and demurred separately upon the ground that the facts stated therein were not sufficient to constitute a cause of action as against them. The demurrers were overruled, and, answering over, they alleged the facts which they now contend constitute a complete defense to any liability on their part. There being no dispute as to the facts, and the amount of plaintiff's damages having been settled for the purpose only of the trial by stipulation, a joint judgment was rendered against them and the city of Lincoln, from which all of the defendants appealed.

The record discloses that the railroad tracks of the

Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, and the Chicago & Northwestern Railway Company cross what is known as "Tenth street," in a populous part of the city of Lincoln, and at the same point; that Lincoln is a city of the first class, having a population of 40,000 and less than 100,000 inhabitants; that at a regular election held on the 7th day of May, 1907, the question of the necessity for the construction of a viaduct on Tenth street over and across the railroad tracks of the above named defendants was duly submitted to the electors of that city, and the majority of said electors voted to require such construction; that thereafter an ordinance was enacted declaring it necessary for the public safety and convenience that said viaduct be constructed by the railroad companies; that the companies refused to comply with the provisions of the ordinance, and a mandamus suit was commenced on behalf of the city to require the defendants to build said viaduct; that pending the mandamus proceeding the railroad companies entered into a stipulation with the city whereby they agreed to build the viaduct, and the city agreed to commence proceedings for the appraisal of damages to abutting property owners, and thereafter plaintiff's damages were appraised and fixed at the sum of \$500, from which appraisal the plaintiff appealed to the district court, where judgment was rendered against the city of Lincoln for that amount; and from that judgment the city prosecuted the former appeal. When the mandate was returned to the district court plaintiff complied with the directions contained therein, and the proceedings above set forth were had, and, from the judgment therein rendered against them, all of the defendants have appealed.

It is contended by the railroad companies that there was a misjoinder of causes of action, for which they insist the judgment of the district court must be reversed. It is argued that the action, so far as the city was concerned, was founded on the provisions of its charter.

while the action as against them is one in tort, and that such causes of action cannot properly be joined. We are of opinion that this contention is unsound. Section 21 of the Bill of Rights provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." It must be conceded that the viaduct, which the railroad companies were required to build, was necessary, not only for the benefit of the general public, but for the safe and convenient operation of the defendants' trains over and across a public thoroughfare. It must also be conceded that the construction and maintenance of the viaduct upon the highway in front of the plaintiff's lots, adjacent to and abutting thereon, created such additional burden as to entitle it to maintain an action for damages therefor. *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123.

Section 10578, Ann. St. 1909, provides, among other things, that every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike or public road. It is admitted that by its charter provisions the city had the power to require the railroad companies to construct the viaduct in question, and had lawfully exercised that power. It therefore follows that, when constructing the viaduct in compliance with the orders of the city, the companies were acting under lawful authority, and their act cannot be said to have been wrongfully or tortiously done. We have then a lawful act properly done which gave the plaintiff a right of action, which if originally brought against the railroad companies and the city together would not have been a misjoinder of causes of action.

It is next contended by the railroad companies that this case was originally commenced against the city by plaintiff's appeal from the award of damages, to which they could not thereafter lawfully be made parties, for that would amount to the bringing of another or different ac-

tion against them. In disposing of this contention it is sufficient to say that by our former judgment the proceeding of which complaint is now made was required in order to determine the rights of all of the parties interested in the subject of the litigation. The order thus made is the law of the case, and is, and will be, adhered to at all stages of this action.

It may be further said that, when the railroad companies were served with a summons duly issued upon the plaintiff's amended petition, they appeared generally, and thus conferred jurisdiction upon the court for all purposes; and it must be observed that, if they are liable to the plaintiff at all for the damages occasioned by the construction of the viaduct, it can make no difference to them whether that liability is determined in this action, or in a separate suit brought for that purpose.

This brings us to the main question presented for our determination, which is, whether the plaintiff is entitled to recover against both the city and the railroad companies, and, if not against both, which of them is liable for the damages to plaintiff's property caused by the construction of the viaduct? From what has already been said there can be no doubt of plaintiff's right of recovery. It is contended, however, that no judgment can be rendered against the city, because it acted in its governmental capacity only, and, if this be so, the contention is well founded. It clearly appears that the city of Lincoln in ordering the railway companies to construct the viaduct in question acted pursuant to the governmental power conferred upon it by its charter provisions for the protection of life and property. The exercise of such power does not of itself subject the municipality to a private action for damages. 2 Elliott, Roads and Streets (3d ed.) sec. 890 (702); *Wagner v. Portland*, 40 Or. 389; *Burkam v. Ohio & M. R. Co.*, 122 Ind. 344; *Allentown v. Kramer*, 73 Pa. St. 406; *Murphy v. Chicago, R. I. & P. R. Co.*, 247 Ill. 614; 3 Dillon, Municipal Corporations (5th ed.) sec. 1159.

It is claimed by the railroad companies that by caus-

ing plaintiff's damages to be appraised the city rendered itself liable therefor. We cannot assent to this proposition. By the section of the statutes above mentioned the city was authorized to provide for appraising, assessing and determining the damages caused to any property by the construction of the viaduct and its approaches; but nothing is contained therein which requires the city to pay such damages. This section also provides that the damages may be paid by the city and assessed against the property benefited; but it contains the further provision that the mayor and council shall have power, whenever any railroad company fails, neglects or refuses to erect, construct, reconstruct or repair any viaduct or viaducts after being required so to do, as therein provided, to proceed with such work by contract in such manner as shall be provided by ordinance, and assess the costs thereof against the property of the railroad company or companies required to do the same; and such cost shall be a valid lien against such property, and be also a legal indebtedness of said company or companies in favor of the city, and be enforced and collected by suit in the proper court. It must be said, in passing, that the damages occasioned by the construction of a viaduct are a necessary part of the costs of such construction. So it seems clear, from a consideration of that section, that it was the intention of the legislature to relieve the city from any liability for the cost of such construction; and that the provision relating to the appraisal of damages must have been inserted therein solely for the benefit of the railroads. This question was before the supreme court of Connecticut in *Burritt v. City of New Haven*, 42 Conn. 174, where, in an able and exhaustive opinion, it was held that the city was not liable for damages to abutting property by reason of the construction of a viaduct over and across the tracks of the New Haven & Northhampton Railroad Company. A careful examination of the record satisfies us that neither by any act, stipulation or agreement on its part has the city rendered itself liable for the

damages to plaintiff's property. It follows that the judgment against the city of Lincoln must be reversed.

But one question remains for consideration, which may be stated as follows: Upon the undisputed facts of this case, are the railroad companies liable to abutting property owners for the damages caused by the construction of the viaduct? Railroads are given the right to lay their tracks in and across the streets of the municipalities of this state by statute, and this right carries with it a corresponding duty on their part to construct and maintain at all times proper and safe crossings on the streets intersected. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27. It would therefore seem that, when such companies in the performance of that duty are required to construct and maintain viaducts, they are liable for the cost of such construction, and all of the necessary incidents thereto. The facts of the case of *Burritt v. City of New Haven*, *supra*, are like those in the case at bar. That is a leading and well-considered case. It was there said: "The privilege of crossing the streets of the city is a part of the franchise of the company, and the necessary approaches constructed for the purpose of restoring city streets to their former usefulness under and as a condition of the exercise of the privilege are a part of the railroad structure authorized by its charter, and in their erection a party incidentally injured has as perfect a remedy against the company for consequential damages, as for a direct injury by it in the original construction of its railroad. The obligation to make compensation is as strong in one case as in the other, and to the discharge of that obligation in the manner prescribed it impliedly bound itself by its acceptance of its charter. *Parker v. Boston & M. R. Co.*, 3 Cush. (Mass.) 107, 116; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294, 310.

"It is insisted that this case is essentially different from the one last cited, because here the bridge is found to have been required by public convenience and necessity only, while there it was for the sole benefit and accom-

modation of the railroad company. We do not see that this distinction affects the obligation of the company in this particular. If public convenience and necessity, by the growth of the city and the resulting increase of travel, require the change in order to restore the street to its former usefulness, the duty of the company under its charter, which was before inchoate, is complete, and the same responsibility adheres to it as if the work was demanded for its corporate benefit alone; and to the responsibility in the performance of the work are attached all the legal consequences which flow from the improper and injurious performance of it. The fact that the duty is by law imposed upon the company is sufficient to charge it with all the consequences of such an execution of it as results in injury to others." To the same effect are *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131; *State v. Minnesota Transfer Co.*, 80 Minn. 108; *State v. St. Paul, M. & M. R. Co.*, 98 Minn. 380; *Northern P. R. Co. v. State*, 208 U. S. 583.

The ordinance under which the railroad companies were granted the right to cross Tenth street provided that, by the acceptance and exercise of the rights so conferred, the companies would save and keep the city harmless from the payment of any and all damages growing out of the exercise of those rights. By exercising the right granted by this ordinance, the railroad companies assumed the obligations thereby imposed; and it necessarily follows that they are liable for the payment of all damages occasioned, not only by the original occupation, but also the necessary expense of making all needful and proper changes in the situation in order to insure to the public a safe and suitable means of travel upon that street; and it can make no difference whether they performed that obligation voluntarily or under legal compulsion.

From the foregoing we are of opinion that both upon principle and precedent the railroad companies are liable to the plaintiff for the damages occasioned by the con-

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struction of the viaduct, and the judgment of the district court as to them should be affirmed. The record, however, contains a stipulation which leaves the question as to the amount of plaintiff's damages open for further consideration, and the judgment of the district court is therefore reversed and the cause is remanded, with directions to allow the parties to litigate that question if they so desire; and, if not, then that court will render a judgment in favor of the plaintiff for the amount stipulated, and against the railroad companies.

REVERSED.

SEDGWICK, J., concurs in the conclusion.

REESE, C. J., not sitting.

ROBERT J. WALLACE V. STATE OF NEBRASKA.

FILED APRIL 8, 1912. No. 17,452.

1. **Larceny: EVIDENCE.** Evidence examined, its substance stated in the opinion, and *held* insufficient to sustain a conviction of the crime of larceny as charged in the information.
2. **Criminal Law: STATUTE: CONSTITUTIONALITY.** The act of the legislature of 1911, defining the crime of hog-stealing, and known as section 117b of the criminal code, is an act complete in itself. It was not intended to, and did not, amend sections 114 and 119 of the criminal code. Its purpose was to create an independent substantive crime and provide a penalty therefor, and is not violative of any of the provisions of the constitution of this state.
3. ———: **INDETERMINATE SENTENCE ACT: VALIDITY.** Chapter 184, laws 1911, commonly called the "Indeterminate Sentence Law," is not vulnerable to the objection that it vests the prison board with judicial powers. It is not in conflict with the provisions of section 26, art. V of the constitution, and is a valid exercise of legislative power.
4. ———: **INSTRUCTIONS: WEIGHT OF EVIDENCE.** When a defendant

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in a criminal prosecution becomes a witness in his own behalf, it is not error for the court to instruct the jury that in considering his testimony they may weigh it as they would the testimony of any other witness, taking into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to it such weight as under all of the circumstances they think it is entitled to.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair and W. D. Oldham, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

BARNES, J.

At the December, 1911, term of the district court for Buffalo county Robert J. Wallace, hereafter called the defendant, was convicted of the crime of hog stealing, and was sentenced to the penitentiary for a period of not less than one year, nor more than five years, "as shall hereafter be determined by the prison board." To reverse that judgment the defendant has prosecuted error.

His assignments are: First, the verdict of the jury is not sustained by the evidence; second, the sentence of the court is contrary to law; third, the sentence of the court by reason of its being indefinite in time of duration is a violation of the constitution of this state and is unauthorized by law, especially that part of the judgment of the court which leaves the "prison board" to determine the duration of the imprisonment is obnoxious to the constitution of this state; fourth, certain errors in the instructions of the court given by it on its own motion. The assignments will be considered in the order stated.

1. As to the sufficiency of the evidence to sustain the verdict, it may be said that the hogs alleged to have been stolen, and which were found in the defendant's possession, were identified and shown to have been the property of

the complaining witness beyond a reasonable doubt. However, it is strenuously argued that the evidence fails to show any felonious intent on the part of the defendant in taking them into his possession. On the trial the defendant testified in his own behalf, in substance, that he resided about 5½ or 6 miles northeast of the village of Amherst; that his business was farming; that his father, on the 12th day of August, 1911, lived in the west part of Amherst; that his father had some hogs, as he expressed it, "I expect between 40 and 45, big and little;" that he went to Amherst on that day, the 12th of August, and arrived there about half past 2 o'clock; went right to his father's place and unhitched his horses and put them in the stable; went into the house and got dinner; that he wanted to get some shelled corn of his father; that he put the sacks in the wagon and then went over to town; that he met his father in town, about 6 o'clock in the afternoon; that they visited around town a while before they went home; that they got home about 6 o'clock; that after they got home his father called his attention to some shoats there. He said they must be the Graham hogs; he was expecting the Graham hogs, and he says you can take them if you still want hogs, as he had bought them from my brother George. He said the hogs were large enough and thrifty enough to be worth \$4 apiece, and he would take them at that price and he gave me his chance. I got the sacks ready because I was going to lodge—got the sacks ready; when I got back from lodge it would be too late to find them, and I got the sacks ready and I pulled the door down on the pig pen and closed the pigs in. The hogs were in the yard. We looked at them. I got the sacks ready and put the pigs in so they would not get away, for I had agreed to take the pigs if the price was all right. Then I went in to supper. We got our supper, and by that time it was 8 o'clock. As I was one of the officers of the lodge I wanted to be there just about 8 o'clock. The lodge adjourned about 25 minutes past 10. When I got to my father's house I loaded the hogs

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right about then. I put the hogs in the sacks and went in and had lunch, hitched up and went home.' I was thinking it was the Graham pigs. "Q. At the time you took those pigs did you think they belonged to Mr. Patterson? A. No, sir; I did not know a thing about it. Q. Whose pigs did you think they were? A. I labored under the impression they were the pigs that were to be delivered that George had bought or traded for from Mr. Graham. Q. Did you intend to steal any one's pigs? A. No, sir; I never intended to, and never want to do anything like that." The defendant's father testified in his behalf. He stated that he had 50 or 60 hogs in the lot on August 12, nine old hogs and the rest spring pigs. He said in substance: I told Robert there were some pigs there running through the yard that George delivered, and he was talking about the hogs and he took them home, and we would settle on the price. I think they were George Wallace's hogs. I did not know what time Robert got the hogs, did not help him. Did not see Patterson that night. On cross-examination by the county attorney the witness made some contradictory statements, but none of them were so inconsistent as to destroy his evidence in chief. The defendant further testified that after they came home his father called his attention to the shoats. He said they must be the Graham hogs. He said he had bought them from George. He said the hogs were large enough and thrifty enough to be worth \$4 apiece, and he would take them at that price, and he gave me his chance; had the conversation with father when we came into the yard. The hogs were running around in the yard; he said he supposed that was the Graham hogs; don't recollect that one was a cripple.

Patterson, the complaining witness, testified that he saw Robert Wallace and his father, James, on August 12, driving two red hogs out of the cornfield at James' place near Amherst; that he tried to count his hogs that night, but failed; that he counted them in the morning, they were seven short; that he found the hogs at Robert Wal-

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lace's place; five had their tails cut off. He (Robert) said he bought the hogs of his father; afterwards he said his father told him there were some hogs, and he could take them; that he took them between 12 and 2 o'clock that night. The county attorney asked Robert if his father gave him the hogs, and he said yes; that Jim Wallace had about 25 hogs, all black, except four red, but they were not like "mine." Wagner, the constable, testified that the defendant said he had bought the hogs, and then that he and his father bought them together. Witness Higgins testified that defendant said he bought them. He told Patterson that if he said they were his hogs they might be. He was willing to turn them over because he did not know where his father got them. When asked how he came into possession of the hogs belonging to Patterson, he said his father gave them to him. George Wallace, who testified for the defendant, stated that he had traded with Graham for four shoats; that they were to be delivered on the day the hogs were taken, but were not delivered until about a week later. It appears that the Graham hogs, when delivered, were black, and there were only four of them, while the hogs in question were red.

The state contends that, because of the contradictory statements made by the defendant and his witnesses, the jury might have reasonably concluded that, when the hogs were taken, defendant and his father intended to deprive the complaining witness of his property, and that Robert expected to convert them to his own use. We are of opinion, however, that the evidence is insufficient to sustain the verdict. In order to convict the defendant of the crime of larceny, as charged in the information, the state was required to prove, beyond a reasonable doubt, that defendant participated in the larcenous taking of the hogs in question from the complaining witness. We think the evidence was insufficient to establish that fact beyond a reasonable doubt. Having reached this conclusion, we could well decline to consider the other questions argued

by counsel for the defendant; but, in view of the fact that they have been ably presented, we deem it best to determine them.

2. It is next contended that the act of the legislature declaring hog stealing a felony, without regard to value, is repugnant to the constitution. The act in question appears in the criminal code as section 117b. It provides: "If any person or persons shall steal any sow, barrow, boar or pig of any value, * * * every such person so offending shall be imprisoned in the penitentiary not more than five nor less than one year and shall pay the cost of the prosecution." We have omitted the provisions of the section relating to receiving such property, because that question is not presented by the record. It is argued that this classification has nothing for its basis; that there is no good reason why the theft of a hog worth one cent should be made a felony, and a theft of \$34.99 of money be a misdemeanor only. This argument was disposed of by the opinion in *Granger v. State*, 52 Neb. 352. That action involved the constitutionality of the cattle stealing law, an act similar to the one here in question. It was there said: "It is suggested in the brief that this 'act is a vicious one, and possesses no point whereby it impresses the court to uphold it.' We cannot yield assent to the proposition; nevertheless, if it be true that the law is not a wise one, it is no reason why the courts should declare it invalid. The argument made by counsel against the statute under consideration would have been more appropriate were it addressed to the lawmaking body, as the constitution has not conferred upon this court the power to repeal laws, but the authority to interpret and enforce them in proper cases." *Ream v. State*, 52 Neb. 727; *State v. Arnold*, 31 Neb. 75.

It is further argued that the law is unconstitutional because the defendant might have been prosecuted under the provisions of section 119 or of section 114 of the criminal code as well as section 117b upon which the prosecution was based, and therefore the state had the

power of election, and that such power renders the act obnoxious in that it destroys the uniform operation of the law. We cannot give our assent to this contention. By section 117b hog stealing is made a definite and substantive crime. The information on which the defendant was prosecuted charged him with a violation of that section, and in order to warrant a conviction the state was required to produce testimony establishing the commission of that offense. The effect of section 117b was to eliminate the offense of hog stealing from the provisions of sections 114 and 119 of the criminal code, and compel the state to prosecute, if at all, under the provisions of that section. It follows that there was no right of election, and this contention must fail.

3. It is further contended that the act in question operates as an amendment to sections 114 and 119 of the criminal code; that amendments are not mentioned in the title, and therefore the act is violative of the provisions of section 11, art. III of the constitution. That question is disposed of in *State v. Arnold, supra*, where it was said: "The act entitled 'an act defining the crime of larceny from the person and, providing a penalty therefor,' approved March 14, 1887, was not, nor was it intended to be, an amendment of section 114, or section 119, of the criminal code, or of any statute then in force. Its purpose was to define a new crime and provide a penalty therefor. It is not inimical to the provisions of section 11, art. III of the constitution of this state."

4. Defendant also contends that "the sentence of the court by reason of its indefiniteness in duration is violative of the constitution of the state, and is unauthorized by law, especially that part of the judgment of the court which leaves the 'prison board' to determine the duration of the imprisonment is obnoxious to the constitution." Various reasons are assigned in support of this contention, and if this were a case of first impression we might be inclined to adopt defendant's view of it. We find, however, that in a number of our sister states what is

called an indeterminate sentence law has been adopted and the courts of these states have uniformly sustained the constitutionality of those acts. The constitution of the state of Illinois is similar to our own, and the legislature of that state passed an act very like the one in question in this case. The constitutionality of that act was challenged in *People v. Joyce*, 246 Ill. 124. There all of the objections to the constitutionality of that act were urged that are now presented in the case at bar. It was there said: "The powers granted to the board of pardons by the parole act of 1899 are not judicial in character but are matters of prison discipline, to be exercised for the benefit of offenders imprisoned in state institutions. The parole act of 1899 is not an interference with the functions of the court, but is rather the exercise, through the legislative and administrative departments of the government, of the power of discipline which the state possesses, and is not unconstitutional as conferring judicial power upon administrative officers. The provisions of the parole act of 1899 with reference to the final discharge of a paroled prisoner are not invalid, as infringing the constitutional right of the governor to grant pardons and reprieves and commute sentences. The sentence of a convicted person under the parole act of 1899 is not a matter of discretion with the court, but is for the maximum term provided by law, and is therefore not indefinite and uncertain. The right of a convicted person to have the court fix his punishment is not a fundamental right, and the fact that the parole act of 1899 does not secure that right to a convicted person does not render the act invalid, as repugnant to the constitutional provision concerning due process of law."

The decision in that case was followed and approved in *People v. Roth*, 249 Ill. 532. A like act of the legislature of Kentucky was upheld in *Berry v. Commonwealth*, 141 Ky. 422. To the same effect are *State v. Ferguson*, 149 Ia. 476; *Palmer v. State*, 168 Ala. 124, 53 So. 283; *George v. Lillard*, 106 Ky. 820. We think that the foregoing sufficiently disposes of this question.

Finally, it is contended that the district court erred in giving the jury the following instruction: "You are instructed that under the laws of this state the accused is a competent witness in his own behalf and you are bound to consider his testimony; but, in determining the weight to be given to his testimony, you may weigh it as you would the testimony of any other witness, and you may take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and give to his testimony such weight as under all the circumstances you think it entitled to." It is argued that this instruction carries the insinuation that, while the accused is permitted to testify, his interest in the result of the suit destroys the force of his testimony. This court has refused to declare this instruction erroneous, in *St. Louis v. State*, 8 Neb. 405; *Davis v. State*, 31 Neb. 247; *Johnson v. State*, 34 Neb. 257; *Housh v. State*, 43 Neb. 163; *Philamalee v. State*, 58 Neb. 320; *Palmer v. State*, 70 Neb. 136. Opposed to these decisions counsel for defendant cite *Clark v. State*, 32 Neb. 246. It appears, however, that the vice of the instruction in that case was a too frequent repetition by the court that the jury, in weighing the defendant's testimony, might consider his interest in the result of the suit. It was there held that the trial court cannot, by repeating this statement, give it undue weight, or say aught calculated to disparage the testimony of the accused. The instruction complained of in the case at bar is not tainted with that vice.

For the reason that the evidence does not sustain the verdict, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

STATE, EX REL. GEORGE S. PETERS, APPELLANT, V. HARRY E. COLEMAN, APPELLEE.

FILED APRIL 8, 1912. No. 17,488.

County Officers: FILLING VACANCY: COUNTY ASSESSOR. Where a vacancy occurs in the office of county assessor more than 30 days prior to a general election, the board of county commissioners is required to fill the vacancy by appointment. In such case the person appointed holds the office until the next general election, at which time his successor should be elected for the remainder of the unexpired term.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. W. Crites, for appellant.

R. L. Wilhite, contra.

BARNES, J.

Action in *quo warranto* brought by the relator to oust the respondent from the office of county assessor of Sheridan county. The information alleges, in substance, that at the general election of 1907 one Sol B. Pitcher was elected county assessor of Sheridan county, Nebraska, for the term of four years, beginning on the first Thursday after the first Tuesday in January, 1908; that he duly qualified and entered upon and performed the duties of that office until the last of December, 1910, when he resigned and removed from the county; that on or about January 3, 1911, the board of county commissioners, in writing, duly appointed the relator to fill the vacancy in said office occurring by reason of such resignation and removal; that he qualified and entered upon the duties of the office, and has ever since, up to the happening of the events hereinafter set forth, been in the full performance of said duties; that chapter 43, laws 1911, provides that in all counties one county assessor shall be elected in the

year 1908, and every fourth year thereafter; that said chapter went into effect and force on the 1st day of July, 1911, and has been, and still is, in full force and effect; that thereby the term of office of the relator as county assessor of said county was extended until the first Thursday after the first Tuesday in January, 1913; that he has never resigned or abandoned his said office; that the respondent, Harry E. Coleman, assuming and pretending that there was a vacancy in said office to be filled at the general county election to be held in November, 1911, did cause and procure his name to be placed on the official ballot at said election as a candidate for said office; and did at said election receive a majority of the votes cast thereat for the office of county assessor of said county to fill an assumed and pretended vacancy; that thereafter, and within 20 days, the respondent qualified and took the oath of office in the form prescribed by law, and gave his bond therefor, which bond was, on or about the 13th day of November, 1911, duly examined and approved by the county judge of said county; that ever since that time the respondent has intruded into said office and usurped the power and functions and franchises thereof, and now assumes to hold the same and exercises all the powers, duties and functions of said office, and claims to be entitled to the emoluments and salary thereto annexed. The information concluded with a prayer that the respondent be ousted from, and the relator be installed into, said office. To this information the respondent filed a general demurrer, which was sustained by the district court for Sheridan county, and the action was dismissed. From that judgment the relator has appealed.

The appellant relies for a reversal on *State v. Rankin*, 33 Neb. 266. We are of opinion that this question should not be ruled by that case. The law relating to county assessors simply provides that in case of a vacancy in that office the county board shall fill such vacancy by appointment. Nothing whatever is said as to how long the appointee shall hold the office, and nothing is contained

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therein which in any manner conflicts with the general provisions of the statutes upon that subject. It therefore follows that this case must be ruled by such general provisions.

By section 5759, Ann. St. 1911, it is provided that vacancies occurring in any state, judicial district, county, precinct, township or any public elective office, 30 days prior to any general election, shall be filled at such general election. Section 5757 provides: "Appointments under the provisions of this chapter shall be in writing and continue until the next election at which the vacancy can be filled." It therefore seems clear that, when the relator was appointed to fill the vacancy caused by the resignation of his predecessor, his appointment held good until the next general election, which was in November, 1911, and if the provisions of chapter 43, laws 1911, operated to extend the term of the office until the 1st of January, 1913, the person chosen at that time would hold his office for the unexpired portion of the term. This seems to be the view adopted by the district court, and we are of opinion that the demurrer to the information was properly sustained and the action rightly dismissed.

The judgment of the district court is

AFFIRMED.

OLIVER WILSON, APPELLANT, v. FRANK G. SPENCER,
APPELLEE.

FILED APRIL 8, 1912. No. 16,637.

1. **Pleading: SUFFICIENCY: ACTION FOR DAMAGES.** In an action for damages against a road overseer for grading a road and removing a culvert, which work was clearly within his discretion and the scope of his duties, the mere allegation in the petition that in so doing he acted maliciously, unlawfully, and not for the public interest, does not state an actionable wrong.

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2. Petition set forth in the opinion examined, and *held* vulnerable to a general demurrer.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

H. C. Vail, for appellant.

O. M. Needham and *F. A. Doten*, *contra*.

LETTON, J.

This is an action for damages against a road overseer for the destruction of a culvert and the digging of a ditch in the highway in front of plaintiff's premises. A demurrer was filed to the petition, which was sustained and the action dismissed. Plaintiff appeals.

In substance, the petition alleges that the plaintiff is a farmer and a resident landowner in Road District No. 1 of Boone county; that the defendant is the road overseer in that district; that a public highway runs north and south along the east line of plaintiff's farm for a distance of one mile, and that there is no way of access to his land except by the public road mentioned; that his land is inclosed by a fence, and that he maintains a gate at a point about midway on the line of the road; that the public authorities about five years ago graded the road and left a ditch and steep embankment opposite the gate, and afterwards built a culvert opposite the gate for the purpose of allowing access thereto; that the defendant, pretending to act as road overseer, recklessly, wantonly, and maliciously, and for the gratification of his malignant feelings, caused the road to be again graded and the culvert to be destroyed and removed; that the culvert was not an obstruction in the road and the grading was not necessary to be done for the good of the public; that defendant left an embankment about five feet high and a ditch about three feet deep in front of the gate, and caused a ditch about twelve inches deep to be made opposite plaintiff's

premises extending for more than half a mile along the road, and left an embankment along said ditch; that he refused to place a culvert or other means of passage across the ditch and refused to allow plaintiff to erect a culvert or other means of passage across to the embankment; that defendant as road overseer had ample funds under his control to erect and maintain a culvert across the ditch, and that the acts of defendant were done wantonly, wilfully, and with malicious intent to injure plaintiff.

Bearing in mind the rules that the allegations of a petition are to be construed most strongly against the pleader and that a demurrer does not admit mere conclusions of law, does the petition state a cause of action? It is evident that the officer charged with the duty of maintenance of highways must, in the absence of supervision or direction by the county board, be vested with the discretion of determining the necessity for grading the road or ditching along the side. Chaos would reign if each abutting landowner should have the power to dictate as to the manner in which a road was to be constructed in front of his premises. The road overseer may act unwisely, but the entire highway within the road district over which his authority extends is within his jurisdiction, and it is for him to determine the work to be done in the highway space so as best to provide for the convenience of public travel. The petition shows that the road was graded for at least half a mile, and it is clear that such acts were within the scope of the overseer's authority and within his discretion.

The general principle is that a public officer is not liable to an action if he acts unwisely in a matter wherein it is his duty to exercise judgment and discretion, even though a private person may be damaged thereby. This rule is particularly applicable to officers in control of highways, for the reason that their operations touch the property of so many persons that, if not exempt, they might be constantly harassed. *McConnell v. Dewey*, 5 Neb. 385; *Kendall v. Stokes*, 44 U. S. *87, 11 L. ed. 506; *Upham v. Marsh*, 128 Mass. 546; *Denniston v. Clark*, 125 Mass. 216;

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Highway Commissioners v. Ely, 54 Mich. 173; *Dean v. Millard*, 151 Mich. 582; *Packard v. Voltz*, 94 Ia. 277. As was well said in *Yealy v. Fink*, 43 Pa. St. 212, 82 Am. Dec. 586: "It is of the utmost importance that officers intrusted with such powers be protected in exercising them, without being terrified with the apprehension of personal responsibility, if their acts should result in harm to any private property." The mere allegation in the petition that in performing work which was clearly within the scope of his duties the officer acted maliciously, wantonly, and unlawfully, does not state an actionable wrong. "Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. * * * When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." Cooley, Torts (3d ed.) *832.

The discussion so far has been with reference to the allegation as to the grading. But the use of the highway is not confined alone to ordinary travelers in front of a landowner's property. He is equally entitled to the use of it as a means of ingress and egress to and from his property, and if deprived of the same by the action of the public authorities the constitution preserves to him his right to compensation. *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641, and cases cited. There are allegations in the petition that the defendant refused to place a culvert across the ditch and refused to allow the plaintiff to do so. Undoubtedly plaintiff was entitled to the means of access either by the action of the road authorities or by his own subject to their approval and direction. *Highway Commissioners v. Ely*, *supra*; *Village of Sandpoint v. Doyle*, 14 Idaho, 749, 95 Pac. 945. But, this may be conceded, and yet not aid the plaintiff's contention. The petition is to be construed most strongly against the pleader, and the presumptions are against him.

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It was clearly within the scope of the defendant's duties to control the construction of culverts or bridges across ditches within the highway. The presumption is that the public officer acted in accordance with his duty in the premises. So far as the pleading discloses the plaintiff might have contemplated placing an unsuitable crossing or culvert across the ditch, which would be an obstruction to the road, and which would interfere with the proper drainage of the highway. The refusal of the defendant to allow the plaintiff to erect a culvert or crossing is not of itself an actionable wrong. The defendant might well refuse to allow an unsuitable culvert to be constructed and would be entirely within his legal rights and duties in so doing. We doubt the mere plea that defendant "refused" is more than a conclusion of law, which is not admitted by a demurrer, but, however this may be, it is clear that the refusal by a highway officer to allow a structure to be erected in a highway by an abutting owner does not constitute a cause of action. If the road overseer believed that the removal of the culvert in front of plaintiff's gate was necessary in the regrading of the road, he was undoubtedly entitled to remove the same, and to refuse to replace it, regardless of what his feeling might be towards the plaintiff. The removal of the material of the culvert which belonged to the public could not be a violation of any property right of plaintiff in the same.

We are of opinion that the mere statement that the defendant acted maliciously and wantonly and not for the public interest in performing acts clearly within the scope of his duties as road overseer, without setting forth any facts to indicate that the work was not performed for the public interest but alone intended to damage the plaintiff, is not sufficient to state a cause of action.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

CHARLES P. BRESEE, APPELLANT, v. JOHN W. PRESTON,
APPELLEE.

FILED APRIL 8, 1912. No. 16,648.

1. **Pleading: DEMURRER.** A general demurrer admits the truth of all material facts well pleaded, but does not admit conclusions of law.
2. ———: **SUFFICIENCY.** When the claim is made that an act is unconstitutional, not because of its substance, but because not regularly passed, the defect in the proceedings must be specifically pleaded. It is insufficient to allege generally that it was not legally passed. *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572.
3. **Judicial Sales: VOID AND VOIDABLE.** A sale of real estate under an order of sale, where the notice is not published at least 30 days before the sale, is not void, but voidable, and the defect is ordinarily cured by confirmation.

APPEAL from the district court for Keya Paha county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, William P. Rooney and A. M. Morrissey, for appellant.

Ross Amspoker and Lear & Lear, contra.

LETTON, J.

The petition in this case alleges in substance that the plaintiff is the owner of a certain tract of land in Keya Paha county; that the defendant is in possession of the same claiming title by virtue of a sheriff's deed issued to his grantor on a sale under a decree rendered in proceedings brought by the county of Keya Paha in the district court for that county to foreclose a tax lien upon the land; that no prior administrative sale had been had, and no tax certificate had been issued to the county; that "the acts of legislature whereunder county attorney claimed to act was void and did not pass with regard for constitutional requirements." It is further alleged that "the said purported sale was void and of none effect for the reason

that the court was without jurisdiction of the subject matter and the defendants therein named never appeared in said action nor consented that the said court might have jurisdiction at any time, and because the notice of the said proposed sheriff's sale was not published in any newspaper printed in said county, nor of general circulation therein, for 30 days before the date of said sale, April 5, 1902, but on the contrary, the only notice by advertisement in a newspaper was for 29 days before the date of sale and not longer." The petition further alleged that neither the plaintiff nor his grantors had any knowledge of the proceedings; that the rents and profits exceed in value the taxes against the premises. He prays that he may be permitted to redeem from the sale; that the sheriff's deed be canceled, and defendant be required to execute a deed to him, for an accounting, and general equitable relief. To this petition the defendant filed a general demurrer. This was sustained by the district court, and the action dismissed.

Only two assignments of error are found in the appellant's brief: "The court erred in giving judgment for defendant and dismissing the petition of plaintiff. The court erred in sustaining the demurrer of defendant." The brief, however, in general terms argues that the act providing for foreclosures by counties was not passed by the legislature in conformity with the provisions of the constitution; that the affidavit for constructive service was insufficient; that the published notice for constructive service was insufficient; and that the sheriff's sale and deed were void for want of notice of sale. The trouble with much of appellant's argument is that the questions raised are not presented by the record. We can only look to the allegations of the petition to determine whether it states a cause of action, and cannot consider allegations found in the brief but not in the petition. The demurrer, of course, admits all material facts properly pleaded, and the only question before the court is whether the facts pleaded constitute a cause of action.

As to the plea that the statutes are void for the reason that "the acts * * * did not pass with regard for constitutional requirements." No facts are pleaded showing the breach of any constitutional requirements. It is an elementary rule of pleading that a demurrer admits only facts well pleaded, and does not admit conclusions of law. *Burlington & M. R. R. Co. v. Dobson*, 17 Neb. 450; *American Water Works Co. v. State*, 46 Neb. 194; *State v. Ramsey*, 50 Neb. 166. Of course, under section 136 of the code it is unnecessary to plead the validity of a statute, because it is a presumption of law. But, when it is claimed that facts exist which rebut the presumption of law, the facts which are claimed to exist should be pleaded so as to inform the court of what is the real issue. Some act of omission or commission by the legislature in conflict with the provisions of the constitution with reference to the manner of passing bills must be relied upon to support this allegation. This is a matter to be proved, and while under our former decisions the court will take judicial notice of the legislative journals, this notice cannot supply the want of a specific plea of the fact upon which the pleader relies. The supreme court of the United States holds: "Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make these facts a part of the complaint for the purpose of giving jurisdiction to a federal court, as the averments, if not sufficient in themselves to give jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge." *Mountain View Mining & Milling Co. v. McFadden*, 21 Sup. Ct. Rep. 488 (180 U. S. 533). *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. Rep. 47.

If a statute is invalid because it is in substance violative of the constitution, it is sufficient to allege generally that it is invalid, but when its invalidity is claimed, not because of the substance of the act, but because in its passage or adoption the legislature did not follow the proceedings required by the constitution, the defect must be specifically pleaded, and it is insufficient to allege generally that it

was not legally adopted and did not pass with regard for constitutional requirements. *City of York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572. In that case it is said: "The petition also contains the following averment: 'The plaintiff alleges that said ordinance * * * was never passed legally and as by law provided so as to make it a valid ordinance.' So far as the last averment is concerned it is clearly the pleading of a conclusion of law without any pleading of any ultimate traversable facts which would lead to such conclusion. When an act is legal or illegal because of the existence or nonexistence of certain facts, those facts must be pleaded. The mere assertion of illegality is not enough. It tenders no issue." While this language referred to an ordinance, the principles of pleading announced apply also to statutes.

We have repeatedly held that, even though a decree entered in a tax foreclosure action by a county without a prior administrative sale is erroneous, it is not void, and a sale based thereon will divest the owner of the land of his title. *Russell v. McCarthy*, 70 Neb. 514; *Cass v. Nitsch*, 81 Neb. 228; *Jones v. Fisher*, 88 Neb. 627.

It is further contended that the sheriff's sale was void for the reason that the notice was published only 29 days instead of at least 30 days, as the statute requires. Had this objection been made at the time of confirmation, it would undoubtedly have been sustained. If overruled, such ruling would, on appeal, have been reversed. If the defendants were duly served with summons, they were before the court and it was their duty to interpose such objection at that time, and, if overruled, to have brought the ruling directly to this court for review. They could not stand by with folded hands and permit this error of the court to go unchallenged and subsequently assail the confirmation collaterally. That they had been duly served and were before the court must be presumed, from the absence of any allegation in the petition that they had not been served with process in the foreclosure suit. The allegation of the petition is, "and the defendants therein

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named never appeared in said action, nor consented that the said court might have jurisdiction at any time." This is all the petition recites upon that point. If they were duly served, and thereafter "never appeared in said action," that was their fault; and, such being the case, it is immaterial that they never "consented that the said court might have jurisdiction at any time." The service gave the jurisdiction. For these reasons, the contention of defendants upon this point cannot be sustained.

This disposes of all the points made in the brief which are based upon facts set forth in the petition. The demurrer to the petition was properly sustained by the district court, and its judgment is, therefore,

AFFIRMED.

REESE, C. J., took no part in the decision.

**FIRST NATIONAL BANK OF SHENANDOAH, IOWA, APPELLANT,
V. CHARLES KELGORD, APPELLEE.**

FILED APRIL 8, 1912. No. 16,672.

Bills and Notes: INDORSEMENT. A promissory note was made payable to "Wonder Stock Powder Company." The only indorsement is "James J. Doty, Prop." A banker who purchased it testified that Mr. Doty was the sole owner of the company, but there was no evidence as to whether the payee was a corporation or a trade name for Doty. *Held*, That the indorsement did not constitute the bank a holder in due course, under the Negotiable Instruments Act.

APPEAL from the district court for Boyd county: **WILLIAM H. WESTOVER, JUDGE.** *Affirmed.*

L. F. Jackson, for appellant.

W. T. Wills and *M. F. Harrington*, contra.

LETTON, J.

This is an action upon a promissory note made by the defendant payable to the order of "Wonder Stock Powder Company." The petitioner alleges that one James J. Doty is the owner and proprietor of "Wonder Stock Powder Company," and that the plaintiff before maturity and in the usual course of business purchased the note for a valuable consideration. The answer denies the execution and delivery of the instrument, and that plaintiff purchased same. It further pleads that the alleged note was without consideration; that the defendant is of foreign birth and cannot read or write the English language; that at the time the alleged note purports to be signed the agent of the company read over to him a paper which purported to be a conditional order for a shipment of Wonder stock powder, and that defendant signed such alleged conditional order and no other paper. The reply was a general denial. The cause was tried to a jury, which returned a verdict for the defendant.

The note in question is made payable to "Wonder Stock Powder Company." It is indorsed in blank, "James J. Doty, Prop." This indorsement is clearly insufficient under section 30 of the Negotiable Instruments Act, chapter 41, Comp. St. 1911, to constitute the plaintiff a holder in due course of business. The only evidence as to the relation of Doty to the concern is that of Albert A. Reed who purchased the note for the plaintiff. He testifies that he purchased it with 59 others from Mr. Doty, and that Doty is sole proprietor of the "Wonder Stock Powder Company." It is not shown whether the Wonder Stock Powder Company is a corporation of which Doty owns all the stock or whether it is a trade name used by Doty in his individual business.

The plaintiff relied upon the law merchant as expressed in the Negotiable Instruments Act for its right to recover as an innocent holder in due course, and has no greater right than is conferred by that act. The purchase

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and delivery of the note transferred the title to plaintiff, but there being, so far as the evidence shows, no indorsement by the payee, the transfer could not vest plaintiff with the privileges of a holder in due course, and the note was subject to the same defenses as might be set up against the original payee. *Freeman v. Perry*, 22 Conn. 617; *Ellis v. Brown*, 6 Barb. (N. Y.) 282. The verdict of the jury must have been based upon a finding that the defendant, who could not read English and could only write well enough to sign his name, was deceived into signing a paper which he believed to be an order for stock food, but which was, in fact, a promissory note, and that he received no consideration for the same. The evidence, while conflicting, is sufficient to support such a finding. This, in the absence of negligence, may constitute a good defense even against a holder in due course. *Willard v. Nelson*, 35 Neb. 651. No exceptions were taken to the giving of the instructions complained of, hence we cannot examine their correctness. We think it unnecessary to consider the other errors assigned.

The judgment of the district court is, therefore,

AFFIRMED.

REESE, C. J., not sitting.

WILLIAM P. FERGUS, ADMINISTRATOR, APPELLEE, v. M. J. SCHIABLE, ADMINISTRATOR, APPELLANT.

FILED APRIL 8, 1912. No. 17,446.

1. **Wills: RIGHT OF ELECTION.** The right of a widow to elect under the provisions of sections 4907, 4908, Ann. St. 1911 (laws 1907, ch. 49, secs. 7, 8), whether she will take the provision made for her in the will of her deceased husband, or take the interest in the estate given her by law, is a personal one, and does not pass at her death to her heirs or personal representatives.
2. ———: ———. A widow made, and the county court recorded,

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her election to take under the law instead of under the will of her deceased husband. She did so under a mistake as to her right to take under the law, but she took no valid steps in her lifetime to have her election set aside. After her death her administrator brought an action to recover some of the provisions made for her benefit in the will. *Held*, That he had no power to make an election for her, and that the court could not ignore the election made in her lifetime of which there was a judicial record.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Reversed and dismissed.*

Reavis & Reavis, for appellant.

Clarence Gillespie and Edwin Falloon, contra.

LETTON, J.

In 1905 Henry Rieger died leaving a will, one clause of which is as follows: "I give and bequeath to my beloved wife Amelia Rieger, in addition to the \$200, which the law gives her out of my personal estate, the sum of \$100. I also desire that my said wife Amelia Rieger shall live in our homestead as long as she shall live; that is, I desire that she occupy it herself and not rent it." The will was duly probated and allowed. During the settlement of the estate and within the statutory time his widow, Amelia Rieger, filed in the county court a written renunciation of the provisions made for her in the will. The widow afterwards made a claim for an allowance as such widow out of the estate, which was resisted by the administrator and the heirs on the ground that she had entered into an antenuptial contract by the terms of which she had barred herself of all rights in the estate of her deceased husband. This litigation was carried on for some time, culminating in an appeal to this court, where it was finally determined that the ante-nuptial contract was valid. After the case was remanded to the district court Amelia Rieger died. This action was brought by the administrator with the will annexed of her estate to recover the provision made

for her in the will of her deceased husband which she renounced. The defendant, who is administrator of the estate of Henry Rieger, deceased, pleaded the facts as to the widow's election and renunciation, and, further, that she had possession and control of the real estate owned by Rieger from the time of his death until her own death. The reply alleges that at the time Mrs. Rieger signed the paper making an election she made a mistake; that it was subsequently adjudicated that she had no right to take under the law; that in the litigation incident to the ante-nuptial contract she filed a reply in the district court in which she asked that, in case it should be determined that she had no right to take under the law, the court would permit her to reconsider her election and take under the will; that the request was never passed upon by the court; that by the adjudication she was deprived of her right to take under the law, and that, therefore, she is presumed to take under the will.

The county court found generally for the defendant, found that the widow had occupied the homestead to the time of her death, and that the wearing apparel, ornaments and household furniture, etc., were set off to her by the appraisers; that on the 14th day of June, 1903, the widow filed her renunciation of the provision made for her in the will and elected to take under the law, and that she did not in her lifetime ask the court to be permitted to make her election and take the provision made for her in the will. The court further found that the second amended reply filed in the district court was filed after trial, and after the motion for a new trial had been overruled, and rendered judgment dismissing the proceedings. On appeal the district court found that the plaintiff is entitled to the legacy of \$100 made to Amelia Rieger in the will, and rendered judgment accordingly. The defendant administrator appeals.

The testimony shows that on the 3d day of October, 1908, a second amended reply was drawn up by Mrs. Rieger's attorney with her knowledge and consent in the

antenuptial contract case. It was not signed by her, or verified by any one, and there is no proof that it was filed before judgment, or that permission of the court was given to file it, or that it was ever seen by the court.

The election made by the widow was not withdrawn in her lifetime. No attempt was made in the county court to be relieved from its operation by virtue of the equity powers of that tribunal. The present proceedings are, in effect, an attempt by her administrator to set aside the election made by the widow in her lifetime and to elect for her that she will take under the will of her deceased husband. There can be no question but that the election made by the widow, however badly advised, was effectual until it was set aside by a court of competent jurisdiction. Her relations to the estate having been fixed and made a matter of judicial record, it could only be changed at her request, or at her instance. The right given to a widow to renounce the will and take a share of the estate which she is allowed by statute is a personal right and does not pass to her representative. It is for her to make the determination, and not for one who is merely appointed to administer her estate. We know of no authority given an administrator to make an election for her and either to accept or reject the provisions made in a will. *Sherman v. Newton*, 6 Gray (Mass.) 307; *Atherton v. Corliss*, 101 Mass. 40; *Harding's Adm'r v. Harding's Ex'r*, 140 Ky. 277; *Welch v. Anderson*, 28 Mo. 293; *Davidson v. Davis*, 86 Mo. 440; *Pennhallow v. Kimball*, 61 N. H. 596; *Williamson v. Nelson*, 62 S. W. (Tenn. Ch.) 53; *Estate of Nordquist v. Sahlbom*, 114 Minn. 329. Conversely, after an election has been made by the widow, if she takes no effective steps during her lifetime to change her status with respect to the estate and to be allowed to withdraw her election, this right, being purely personal, dies with her. The finding of the county court as to the property which the widow received seems to be sustained by the evidence, so that she has had the benefit of the provision in the will, except the money legacy. We think her election cannot be

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set aside in the manner attempted, and that the district court erred in awarding judgment for the plaintiff.

The judgment of the district court is, therefore, reversed and the cause dismissed.

REVERSED AND DISMISSED.

**HUGH MCCAFFREY ET AL., APPELLANTS, V. CITY OF OMAHA
ET AL., APPELLEES.**

FILED APRIL 8, 1912. No. 16,567.

1. **Municipal Corporations: STREET IMPROVEMENT DISTRICTS: LEVYING ASSESSMENTS.** Before the mayor and council of a city of the metropolitan class are authorized to order the paving of a street in a district not entirely within 4,500 feet from the streets surrounding the city hall grounds, there must be a petition of the property owners of the proposed district, and a street improvement district must be created by ordinance (Comp. St. 1911, ch. 12a, secs. 106, 107). The improvement district so formed is the foundation of all further proceedings in that behalf, including the levying of taxes to pay for the improvement (sec. 198) and the relevying of taxes for the improvement when a former levy has been set aside for irregularities (sec. 186).
2. ———: ———: ———. All taxes for such improvements must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district.

**APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed.***

*B. N. Robertson, H. C. Robertson, Joseph McCaffrey
and Harry Fischer, for appellants.*

Harry E. Burnam, I. J. Dunn and John A. Rine, contra.

SEDGWICK, J.

In August, 1907, the mayor and council of the city of Omaha passed an ordinance "creating improvement district No. 961 in the city of Omaha for the improvement of that part of Jackson street from 28th street to the west line of 30th street in said city, by curbing and paving, and fixing and defining the boundaries of said district and ordering the improvement of the same." The ordinance fixes the boundaries of the district, names the lots and blocks included therein, and directs the city clerk to advertise for and receive bids upon material of different kinds. Afterwards, an ordinance was passed reciting that the record owners of lots in the improvement district "have failed to designate the material for said pavement" and providing that the material used shall be "Purington vitrified brick block for paving and Indiana stone for curbing." Afterwards an ordinance was passed entitled "An ordinance levying a special tax and assessment on all lots and real estate within street improvement district No. 961 in the city of Omaha, to cover the cost of paving and curbing Jackson street from 28th street to 30th street." By this ordinance taxes were levied against lots not included in the improvement district. The owners of such lots objected to the assessment of such taxes and afterwards appealed to the district court. The district court sustained the action of the city council, and the property owners have appealed to this court.

The counsel for the city insist that the mayor and council can levy taxes to pay for the improvement upon any and all property benefited thereby, whether the same is within or without the improvement district. Section 107, ch. 12a, Comp. St. 1911; provides that the mayor and city council shall have authority to create street improvement districts for the purpose of improving all streets, alleys, or other public grounds therein by paving, etc., and section 106 provides that in the same ordinance that creates improvement districts for paving, etc., the mayor and council

shall "direct the city clerk to advertise for and receive bids upon" different kinds of material. Section 107 provides that the mayor and council may order the improvement by ordinance and cause it to be made when it is embraced in any district, the outer boundaries of which shall not exceed a distance of 4,500 feet from any of the streets surrounding the city hall ground. If the improvement is in a district "outside of said 4,500 feet limit" it can be ordered "only upon petition of the record owners of a majority of the frontage of taxable property in such district." This improvement district was outside of the specified limit.

The principal purpose of creating an improvement district is to determine what property is liable to assessment if specially benefited, and to give to the owners of property liable to be assessed for the improvement "a voice in the determination of how, when and where the improvement shall be made." The formation of the improvement district is the foundation for all subsequent proceedings. This district so formed composes the territory to be affected by the improvement, which it is supposed will be benefited thereby. Property owners within the district must take notice that their property will be affected, and that they may be called upon to pay the expenses of the improvement. The second subdivision of section 108 of the act requires the mayor and council "to give the property owners *within any district*" opportunity to designate the materials to be used. The district so formed must be given a definite corporate name for the purpose of paying for the improvement. Section 198. The formation of the district is also important because all of the property owners within the district, as above stated, are entitled to participate in designating the materials to be used. "Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners therefor sign in such a way as to be fully and legally bound, * * * the whole tendency of recent legislation in this state has been to

give those who are to be assessed with the cost of paving a voice in the determination of how, when and where the improvement shall be made." *Batty v. City of Hastings*, 63 Neb., 26. In *Morse v. City of Omaha*, 67 Neb. 426, this court quoted with approval the following statement of the supreme court of the United States, in *Ogden City v. Armstrong*, 168 U. S. 224: "No jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained," and in the same case this court quoted from *Sharp v. Speir*, 4 Hill (N. Y.) 76, in which it was held that it was not competent for the city authorities to decide "that a majority of the persons intended to be benefited had signed" the petition for the formation of the district, unless such was the fact, and that that question could be subsequently investigated by the courts. It also quoted from the supreme court of Michigan in *Auditor General v. Fisher*, 47 N. W. 574 (84 Mich. 128), to the effect that whether a majority of the property holders had signed the petition could be determined in collateral proceedings. In *Wiese v. City of South Omaha*, 85 Neb. 844, this court, as the basis of its decision, quoted with approval from Welty, Law of Assessments, sec. 297: "An important principle of law in this connection is that the district which is to be taxed with an assessment to pay for a local improvement must be accurately defined." In the syllabus the law is stated to be: "It is the duty of a city, when creating an improvement district for a local improvement, to define the limits thereof with sufficient certainty to identify the lots or lands sought to be included therein, and to publish a statement of such limits." The discussion in the opinion is upon the theory that the property to be assessed must be included in the improvement district. In *Shannon v. City of Omaha*, 73 Neb. 514, it is said in the first paragraph of the syllabus: "All of the property in a sewer district which is benefited by the improvement should bear its fair proportion of the neces-

sary expense," and in the opinion, "Such expense should be borne by the property in that district especially benefited thereby to the extent and in the proportion of such special benefits." It was held that when improvements are contemplated in a sewer district the council cannot determine in advance what part of the property in the district will be benefited and form a new district embracing only such property, because by so doing they would exclude property in the old district, and not included in the new, from assessments for the improvement. It is not necessary to cite and review the innumerable decisions of this court that are predicated upon that proposition. Various other sections of the act of 1905, under which these proceedings were had, declare and imply the importance of the power to form an improvement district for such purposes, and the statute as a whole is in harmony with our numerous decisions. It has also been held by this court, as stated in *Morse v. City of Omaha*, 67 Neb. 426: "Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by presumptions."

Under the contention of the city in this case, the formation of an improvement district has no purpose whatever, no subsequent action of the city authorities or the property owners has any reference to the improvement district in any manner; and this in the face of the statute which forbids the council to take any other proceeding in the matter until they have created the improvement district. The contention is that, if the improvement district has been formed and the improvement has been made, the authorities may levy assessments to pay for the improvement without any regard to the improvement district, and upon property beyond its limits. It is not necessary to determine whether the legislature could confer such, here-

tofore unheard of, powers upon the city council. It is sufficient to know that it has not intended or attempted to do so. This question is to be determined by a construction of the statute, and if the various provisions of the statute are construed together there can be no doubt of the legislative intention. Section 198 of the act provides that for the purpose of paying for the the improvement the mayor and council may issue bonds of the city to be called "District Street Improvement Bonds' of District No. —," and may provide that the "special taxes and assessments levied *in said district* shall constitute a sinking fund for the payment of said bonds and interest." Here is direct and plain legislation that when bonds are issued property outside of the district cannot be assessed for the improvements. And, again, section 186 provides that in cases of mistakes, irregularities, etc., in the proceedings the mayor and council may correct the proceedings and levy (if no levy had been made) or relevy (if a former levy had proved invalid) "a special assessment on any or all property in said district"—an express provision that no re-levy can be made on property outside of the district. Did the legislature intend that, while no property outside of the district can be taxed to pay for the improvements when bonds are issued, still when no bonds are issued property outside of the district may be assessed for the same improvement, and that the first levy can be made on property outside of the district; and if that levy is set aside for irregularities the relevy can only be made on property inside the district? It is not necessary to inquire whether the legislature, if it desired, could so trifle with the interests of the taxpayers, because it is manifest that it has neither intended nor attempted to do so.

Section 107 provides that "the mayor and city council shall have power to levy special taxes or assessments on account of said improvements on any or all property benefited thereby according to the special benefits received by said property from said improvement." This follows the provision authorizing the mayor and council "to

create street improvement districts for the purpose of improving all streets," and the general language used in regard to the special assessments clearly applies to property within the district, which by the preceding clause is created for that very purpose. No taxes for such purpose can be levied upon property in excess of benefits to that property. Without such limitation the statute would be unconstitutional, and the purpose of this clause is to restrict the amount of the levy to the special benefits received by the property taxed. It was unnecessary to repeat in the second clause of the section what was so plainly said in the first, that the district was created for the purpose of improving the streets, which necessarily included the formal proceedings and providing the means for such improvement. That clause of the second subdivision of section 108 of the act, which provides that before improvements are ordered in any district there must be a petition of the "record owners of a majority of the taxable foot frontage of property upon such street or alley to be improved within said district," is cited. We are asked to construe this clause of the statute as though it read: "Record owners of a majority of the frontage of lots or tracts abutting upon the improvement." It would give no meaning whatever to the words; "taxable foot frontage of property upon such street or alley to be improved within said district." It is not the object of this clause of the statute to limit the territory that shall be embraced in the improvement district, nor to change the law as to the purposes for which an improvement district may be formed. The object is to afford a method of determining when the proper number of property owners within the district have signed the petition.

Section 177 of the act provides: "All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate specially benefited (by) such improvement, or (and) within the district created for the purpose of making such improvement." It is con-

tended that this means that property can be assessed if either of two things exist; that is, if it is specially benefited, or if it is within the improvement district, but such construction would make the section unconstitutional. No property can be assessed unless it is specially benefited. Therefore this language cannot be given such an extended meaning. It is the duty of the court to construe the act of the legislature so as to uphold it rather than to give such meaning to the words as to render the act unconstitutional. When this section is construed together with the remainder of the act, it is manifest that the legislature intended that property within the district specially benefited should be assessed for the improvement. Sections 186 and 198, above quoted, plainly show that it was the purpose and meaning of the legislature to provide for the creation of an improvement district which should include all property to be assessed, and that the owners of all property to be assessed for the improvement shall have a "voice in the determination of how, when and where the improvement shall be made," as is said in *Batty v. City of Hastings, supra*, and substantially also in many other decisions.

It is suggested that the mayor and council might, by a subsequent ordinance, create a "taxing district" which would include property benefited but not included in the improvement district required by statute. In all the different states it is required when work of this kind is to be done that a district shall be formed. This district is sometimes called a paving district, a sewer district, a taxing district, and assessment district, or an improvement district. The latter is a general word and covers all of the purposes for which the district is formed. It makes no difference which one of these several names is given to the district. Our statute requires that the district be formed the first thing that the council does, and calls it the improvement district, and says that it is for the purpose of "improving all streets * * * by paving," etc. In the index to Page and Jones on Taxation by Assess-

ment we find the title "Improvement District," and a reference to section 249 for a discussion of the power of an improvement district. Section 249 refers to the district that the law requires to be formed several times, and in this same section it names it "a special assessment district" and "an assessment district" and "the improvement district" and again "an assessment district." These authors used the names interchangeably. The same authors say in section 874: "The power of fixing an assessment district is frequently conferred by statute upon the council of the public corporation, by which the improvement is to be constructed, or some body corresponding thereto. Under such statutes the assessment district must be fixed by ordinance. * * * A general description of the property embraced in an assessment district is sufficient. It has been said that any description which would be sufficiently certain in a conveyance is sufficiently certain as a description of an assessment district." And in section 833: "If the statute requires the resolution to specify the exterior boundaries of the district benefited, an ordinance which describes the exterior boundaries as 'the land fronting upon a given described street between two specified cross-streets' is insufficient, as it does not show the depth of the improvement district from such street. Whether the resolution which fixes the boundaries of the assessment district is in compliance with statute is a state question, and not a federal question." In *Whitney v. Common Council of Village of Hudson*, 37 N. W. 184 (69 Mich. 189), the supreme court of Michigan states the law to be: "Under a village charter (Sess. Laws Mich. 1867, Act No. 266, sec. 38) providing that the council may levy a tax for paving streets upon such premises as in their opinion are benefited thereby, a resolution of the council to pave part of a street, declaring that 'the real estate abutting or adjoining said street * * * shall constitute the taxation district for such purpose' is illegal, as not specifying a definite taxing district." And in *Boehme v. City of Monroe*, 106 Mich. 401, the court ad-

hered to this decision, and in the first paragraph of the syllabus shows that it is necessary that the resolution to pave a street shall designate the paving district. Can such a district be formed by mere implication by simply levying a tax upon a certain lot or lots?

Our statute requires the council to form an improvement district, as before stated, but it nowhere requires or authorizes them to form another district. The term "taxing district" is not named in the statute. Section 175 provides that the council shall sit as a board of equalization, and that as such board it shall "hear and determine all complaints, and shall equalize and correct such assessment" (that is, the assessment that has been reported by the proper authorities). That is all that the board of equalization can do, and then, after all corrections have been made, the council, not as a board of equalization, but "at a regular meeting thereafter," can levy such special assessments; that is, such special assessments as have been equalized by the board of equalization. This is all that the council can do, and it is impossible to find in these provisions any authority for forming any taxing district, and it would seem to be an idle thing to do, after the district which the law requires has been already formed in the commencement of the proceedings. The improvement district is the foundation of all other proceedings, and the improvement is to be paid for by issuing bonds, styled "Improvement district bonds," giving the number of the district, and by levying a tax upon the property in said district to pay the bonds. If the first assessment is set aside for irregularities a new assessment may be made upon the property *in the district*.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., took no part in the decision.

BARNES, J., dissenting.

I cannot concur in the majority opinion for the follow-

ing reasons: Subdivision 2, sec. 107, ch. 12a, Comp. St. 1907, which was in force and constituted a part of the Omaha charter when the improvement district in question was created, gave the mayor and council power to order a street improvement upon a petition signed by the record owners of a majority of the frontage of taxable property within the district, and contained no provision which required the signatures of the owners of nonabutting property which would ultimately be benefited thereby. It appears that the owners of the lots in question herein were not required to sign the petition, and therefore the charter gave them no right to protest against the formation of the improvement district, or to select materials to be used in making the street improvement. See subdivision 2, sec. 108 of the charter. This fact gave appellants no legal right to complain of the assessment in question, for, as was held in *Kountze v. City of Omaha*, 63 Neb. 52, it would have been competent to commit the propriety of paving the streets of Omaha to the uncontrolled discretion of the mayor and council in all cases; and in *Dennison v. City of Kansas*, 95 Mo. 416, it was said: "The legislature can confer on a city council the power to improve the streets of the city at the cost of the property owners without requiring a petition therefor."

It appears from the record that the questions actually litigated and determined by the district court are as follows: Did the board of equalization and assessments have the power to create a taxing district embracing lots not actually abutting upon the street improvement? And could such nonabutting lots be taxed to pay for the improvement to the extent and amount to which they were benefited thereby? Chapter 12a, Comp. St. 1907, commonly called the Omaha charter, so far as it relates to the foregoing questions, reads as follows: Section 177. "All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate specially benefited by such improvement, or within the district

created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvements, such benefits to be determined by the council sitting as a board of equalization. Where they shall find such benefits to be equal and uniform, such assessment may be according to the foot frontage, and may be prorated and scaled back from the line of such improvement according to such rules as the board of equalization shall consider fair and equitable." It is provided by section 180: "In cases where paving has been already done in whole or in part, or contracts have been let therefor under existing laws, in case the lots and real estate abutting upon that part of the street ordered paved as shown upon any such plat or map, are not of uniform depth as well as in all cases where, in the discretion of the board of equalization, it is just and proper so to do, the said board shall have the right and authority to fix and determine the depth to which real estate shall be charged and assessed with the cost of such improvement, without regard to the line of such lots, the same to be fixed and determined upon the basis of benefits accruing to the real estate by reason of such improvement. The provisions of this section in regard to the depth to which real estate may be charged and assessed shall apply to all special assessments except assessments for sidewalks."

The record discloses that the board of equalization found that the lots situated upon each side of the street improvement in question to the center of each adjoining block were benefited by the improvement, and therefore, to that extent, included the nonabutting lots owned by the appellants within the assessment district and assessed them for actual benefits. By section 6, art. IX of the constitution, it is provided: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited." Therefore, it seems clear that the foregoing provisions of the Omaha

charter are not unconstitutional, and from a reading of those sections it is not to be doubted that the board of equalization, in creating the taxing district, and in making the assessments complained of; did not exceed its jurisdiction. It appears that the district court found that the property of appellants was especially benefited to the extent of the assessments of which they complain. That question having been litigated and determined by the district court in favor of the city, and there being sufficient evidence in the record to sustain the finding, a court of review should not set it aside.

The majority opinion holds that the provisions of sections 186 and 198 of the charter, which authorize a levy of special assessments, and provide for the issuance of bonds to pay for street improvements, require us to place such a construction upon the charter as will prohibit the board of equalization and assessments from assessing property benefited by the improvement to pay for such benefits unless it is included in the ordinance passed and approved by the mayor and city council creating what is called an improvement district. In answer to this declaration it may be said that, at the request of the inhabitants of the city of Omaha, the legislature, in the year 1905, enacted a law creating charters for cities of the metropolitan class; and since that time the authorities of the city of Omaha have paved and improved many miles of its streets, and to pay the costs of such improvements the property actually benefited thereby has been assessed to the extent of such benefits. Unless compelled to do so, we should not reverse the judgment of the district court and adopt a different construction of the charter provisions. To do so will result in great hardship and confusion, will encourage litigation, and the courts will soon be congested with suits by which the many will seek to compel the few to bear the whole burden of paying for necessary public improvements.

In Page and Jones on Taxation by Assessment a clear distinction is made between what is called an improvement

district and a taxing district. An improvement district as such is scarcely mentioned at all in that work, while the whole treatise deals almost exclusively with what is called the taxing district. In section 554 of the work it is said: "If, on the other hand, the legislature has given to commissioners specially appointed for that purpose, power to determine what property is benefited and thus to lay out the assessment district, the city council cannot, by restricting the district to the property contiguous to the improvement, prevent the commissioners from including property benefited by the improvement but not contiguous thereto." It must be observed that the Omaha charter confers the power upon the city council to order the improvement, but withholds the authority from that body to create the taxing district. It confers the power to determine what property is benefited and to assess the same to pay for the improvement upon the board of equalization and assessments. Under a like charter, in *In re Westlake Avenue*, 82 Pac. 279 (40 Wash. 144) it was said: "Under laws 1893, p. 189, ch. 84, providing that all property benefited by a local improvement shall be assessed by commissioners appointed by the court, and imposing on the commissioners the duty to examine the locality where the improvement is proposed to be made and the parcels that will be benefited, the commissioners are authorized to determine what property is benefited, and the court appointing them cannot restrict the assessment to the property embraced in the district prescribed by the ordinance providing for the improvement, or set aside an assessment roll made by the commissioners because they assessed property not within the district created by the ordinance." This rule was also approved in *Bigelow v. City of Chicago*, 90 Ill. 49 (see p. 55); *People v. City of Buffalo*, 147 N. Y. 675; *Spencer v. Merchant*, 100 N. Y. 585. In *People v. City of Buffalo*, *supra*, it was said: "Section 143 provides that the common council shall estimate and fix the amount of money to be raised by local assessment. There is no provision that the common council shall fix the assessment

district. In the absence of any indication that the assessors or other body should possess this power, it might very well be that it would reside with the common council under the grant of legislative power. But section 145 declares that the board of assessors shall assess the amount ordered to be assessed for local improvements upon the parcels of land benefited by the work, act or improvement in proportion to such benefit. The common council under the charter are to determine what local improvements shall be made and the amount to be locally assessed therefor. But the clear implication from section 145, in the absence of any other charter provision on the subject, is that the assessors are both to fix the district of assessment and distribute the tax." From the foregoing it seems clear that the judgment of the district court in construing the sections of the charter in question is supported both by principle and precedent.

It has also been suggested that the form of the bond described in section 198 prevents us from approving the construction adopted by the city authorities and the trial court. Upon this point it may be said that it is the duty of the board of equalization and assessments to determine what property is actually benefited by the improvement, and the final determination of that question fixes the boundaries of the improvement or taxing district; and in case it is deemed best to issue bonds to reimburse the city for the cost of the improvement instead of dividing the tax into ten annual payments, then the board should designate the taxing district by the number adopted at the time the improvement is ordered. This would comply with the requirements of the charter and avoid any confusion or misunderstanding. Upon a careful review of the authorities and of the charter provisions, I am of opinion that the construction given by the district court to those provisions is a reasonable one, and ought to be sustained.

Finally, it appears that the appellants have had their day in court; that the questions presented by them have been fairly litigated and determined; and it follows that

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the payment of their just proportion of the cost of the street improvement according to the special benefits accruing to their lots does not deprive them of their property without due process of law. *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 550, 53 Am. St Rep. 557. For the foregoing reasons, the judgment of the district court should be affirmed.

ROSE, J., concurs in this dissent.

IN RE ESTATE OF MARIE GAMBLE.

EDWARD GAMBLE, APPELLEE, V. ESTATE OF MARIE GAMBLE,
APPELLANT.

FILED APRIL 8, 1912. No. 16,651.

1. **Executors and Administrators: CLAIMS AGAINST ESTATE: APPEAL.**

Upon appeal from the allowance by the county court of a claim against the estate of a deceased person, the district court tries the case *de novo*, and must determine whether the claim was filed in time in the county court and whether an amendment allowed by the county court was such a departure from the original claim as amounts to filing a new and different claim after the time limited therefor had expired.

2. ———: ———: **AMENDMENT.** A claim filed in county court against the estate of a decedent alleged that the deceased, being liable upon two promissory notes, requested the claimant to pay the balance due thereon and agreed to repay him the amount so paid, and that he made the payment accordingly, and asked that the amount with interest be allowed against the estate. Claimant afterward asked leave to file an amended claim, which was in substance the same as the original claim, except that it alleged that upon the said payment by him the payee delivered the notes to the claimant, and that claimant then became and still is the holder of the notes and entitled to the money due thereon. *Held*, That the amendment was justly allowed.

3. **Bills and Notes: PAYMENT: EVIDENCE.** When the balance of a promissory note is received by the payee from one who is a stranger to the paper, the fact that the payee marked the note

"paid" is not conclusive; it is competent to prove by oral evidence that the person making the payment intended to hold the note as a liability of the maker, and that the note was so received by him at the time of making the payment, and without knowledge on his part at the time that the word "paid" had been written thereon.

4. **Pleading: DEFENSE OF COVERTURE.** Coverture is an affirmative defense and must be pleaded and proved or it is waived.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Henry M. Kidder, for appellant.

George L. Loomis and *H. C. Maynard*, contra.

SEDGWICK, J.

The county court of Dodge county allowed a claim of Edward Gamble against the estate of Marie Gamble, his deceased wife. Upon appeal to the district court for that county the cause was tried to a jury, and the court instructed the jury to find a verdict in favor of the claimant, Edward Gamble, and an appeal has been taken to this court on behalf of the estate.

1. It appears from the record that the claim of Edward Gamble first filed alleged that Marie Gamble made and delivered to one Nicholas H. Schreiner two promissory notes, one for \$150 and the other for \$1,048.50, and that afterwards, the said notes having been paid only in part, this claimant, at the request of Marie Gamble, advanced and turned over in payment of the balance of the remaining note certain live stock of the value of \$300, and that the said note was thereupon turned over by the payee therein to this claimant, and "that said Marie Gamble was to pay to said Edward Gamble said amount so paid by him, to wit, about \$300, with interest thereon according to the tenor of said notes," and asked that his claim for \$300 and interest be allowed against the estate. Some time afterwards, the county court having heard evidence

upon this claim and having taken the matter under advisement, the claimant asked to file "an amended petition and claim instanter." This amended claim described the notes as before, and alleged that they were secured by a mortgage, and that the mortgaged property had been taken and the value allowed upon the notes, and that there was still a payment due upon one of the notes of \$300, which amount the claimant, at the request of Marie Gamble, advanced of his own money and paid to the payee of the note, who thereupon turned over and delivered said notes to this claimant, and that the claimant then became and still is the owner and holder of the said promissory notes, with interest thereon according to the terms of said notes. It appears that when this amended claim was offered an objection was made, among other things: "That the said amended petition and complaint does not state any new fact or allegation constituting a cause of action against the estate." The objection was overruled and the claim filed, and afterwards a motion was made to strike the amended claim from the files, "for the reason that said amended petition raises a new cause of action not alleged in the original claim filed herein." This objection that the amended claim raises a new cause of action becomes material in this case because, at the time when the amendment was filed, the time for filing claims against this estate had passed and claims not then filed were barred. Upon appeal to the district court this objection was renewed, and it was there insisted in behalf of the claimant that this question could not be raised upon appeal, and that alleged errors of the county court in the hearing of claims against an estate could only be reviewed in the district court upon petition in error. We think this objection was not well taken upon the part of the claimant. The record from the county court necessarily showed the nature of the original claim filed, and of the amendment and the date of filing the amendment. If the alleged amendment constituted a new claim and not an amendment of the old one, the district court must have found that it was barred, not having

been filed in time, and this question could be raised and determined upon appeal from the county court.

2. It will be noticed that the only change introduced by the amendment was to the effect that, when Mr. Gamble paid the amount due upon this note at the request of Mrs. Gamble, he did so expecting to hold the note himself as evidence, whereas in the original claim the allegation was that she agreed to repay him the amount which he paid for the note according to the tenor of the note. The identity of the transaction is preserved. The liability of Mrs. Gamble to this claimant arose from the fact that Mr. Gamble paid the balance of the note and so became substituted for the original payee, and the allegation that he intended to and did take the note and hold it as evidence of the existing liability does not change the origin and basis of the claim which he makes. We think that the county court was right in allowing the amendment.

3. It is contended that the evidence shows that Mr. Gamble paid the debt as a voluntary payment and that the notes were canceled and surrendered upon that payment. The oral testimony, as contained in the bill of exceptions, is not conflicting. The question upon this point as presented in the briefs is one of law upon the construction of the facts as established by the evidence. It appears that, when the property was taken under the chattel mortgage which secured these notes, a settlement of the whole matter was made in the office of Mr. Loomis, an attorney at law, who was acting at that time solely for the mortgagee; the mortgagee and other parties interested in the matter being present. The evidence shows that when Mr. Gamble paid the balance of the notes to the mortgagee, Mr. Loomis, acting then for the mortgagee, wrote across the face of the notes: "Paid. January 23, 1904," and turned the notes over to Mr. Gamble. Mr. Gamble testified that he did not know that the notes were so marked until "after I took possession of the notes." And Mr. Loomis testified that he so marked them without the knowledge or consent of Mr. Gamble, and simply by force of habit in the interest of the

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mortgagee whom he was representing. Ordinarily when one, who is not connected with or interested in negotiable papers, pays the amount thereof to the holder, the presumption is, in the absence of evidence indicating the contrary, that he becomes the holder of the paper himself, and we think that the district court was right in holding that under this evidence Mr. Gamble became the holder of this note and was entitled to present the same as a claim against this estate.

4. It is suggested that, the decedent being a married woman at the time the notes were given, her estate is not liable thereon, there being no evidence that she executed the notes with reference to her separate estate. The record does not show that any such question was raised in the county court, nor in the district court. The defense of coverture must be pleaded, and we cannot now determine that the district court was wrong upon this point.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

LINCOLN GRAIN COMPANY, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED APRIL 8, 1912. No. 16,972.

1. **Carriers: DIVERSION OF SHIPMENT: ATTACHMENT: LIABILITY.** If a carrier accepts property upon agreement to transport it to a certain destination, and diverts the shipment to a different point in another state where the property is attached upon an alleged claim against the shipper, and the shipper thereby loses the property, the carrier is liable therefor as for conversion.
2. ———: ———: ———: **JUDGMENT.** In such case where the foreign attachment is purely *in rem*, and no service is had upon, or appearance made by, the shipper, the finding and judgment is

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binding upon the property only, and not an adjudication of the personal liability of the shipper to the attaching plaintiff.

3. ———: ———: ———: **Set-Off.** It appearing from the evidence in this case that this plaintiff was not in fact indebted to the attaching creditor, the measure of damages is the value of the property at the point of shipment, and the carrier is not entitled to offset the amount realized by the attaching creditor on his alleged claim.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

J. E. Kelby, A. R. Wells, E. C. Strode and M. V. Beghtol, for appellants.

John M. Stewart, contra.

SEDGWICK, J.

This plaintiff delivered to the defendant, the Chicago, Burlington & Quincy Railroad Company, at Palmyra, Nebraska, a car-load of corn, to be transported, as provided in the original bill of lading, to Louisville, Kentucky. Afterwards, at the request of the plaintiff, the bill of lading was amended by the said railroad company so as to require the corn to be transported to Nashville, Tennessee. The railroad company disregarded this change in the bill of lading and delivered the corn to St. Louis to the defendant, the Illinois Central Railroad Company, and by that company it was transported to Louisville, Kentucky, where it was attached at the suit of A. C. Schuff & Company against this plaintiff. It was agreed that the attachment proceedings were regular and that the corn was sold thereunder. This action was brought against both railroad companies to recover the value of the corn, and upon trial in the district court for Lancaster county the plaintiff recovered a judgment as prayed, and the defendants have appealed.

1. The defendants contended that there was no conversion of the corn, because the car of corn had arrived at

St. Louis and had left the hands of the Burlington Company before the original bill of lading was amended by its agent and the new shipping directions indorsed thereon. Without determining whether this would be a defense for either of the defendant companies, it is sufficient to say that we do not find the evidence in the record supporting this position, and the presumption must be that the corn was delivered by the Burlington company after the bill of lading was amended by its agent, and therefore contrary to the contract of shipment. If the corn had been shipped as agreed in the amended bill of lading, it would not have been seized as it was, and in such case it seems the defendant is liable as for a conversion. *Western & A. R. Co. v. Ohio Valley Banking & Trust Co.*, 107 Ga. 512; *Cleveland, C., C. & St. L. R. Co. v. Schaefer*, 90 N. E. (Ind. App.) 502.

2. The defendants contend that the plaintiff is bound by the Kentucky judgment, and that therefore the amount which the sale of the corn paid upon the liability of the plaintiff to Schuff & Company should have been deducted from the damages allowed the plaintiff in this action. The proceedings in Kentucky were purely *in rem*. This plaintiff was not personally served and made no appearance therein. That court therefore had jurisdiction of the property, but not of this plaintiff. The plaintiff is therefore not bound by the finding of the Kentucky court that an indebtedness existed against it in favor of the plaintiff in the attachment proceedings; and it is stipulated in this action that the president and bookkeeper of the plaintiff company "will testify that such claim is absolutely without any foundation and that the Lincoln Grain Company never did owe A. C. Schuff & Company anything upon the alleged cause of action." There was no evidence offered that any such indebtedness in fact existed. The plaintiff therefore was entitled to recover the value of the corn at the place of shipment. The defendant companies each asks in its answer and in the brief that the court determine which of the two defendant companies is liable. The trial

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court did not determine this question, but rendered a judgment against both defendants. The point is not argued in the brief, and we do not find sufficient evidence in the record to enable us to determine it.

The judgment of the district court is

AFFIRMED.

WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT,
V. CHEYENNE COUNTY ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,992.

OPINION on motions to modify opinion reported in 90 Neb. 748. *Former opinion modified.*

PER CURIAM.

On motions for modification of the opinion. By the former opinion (90 Neb. 748) a judgment was directed in favor of the plaintiff "for the amount of its claim, less the amount of the freight bills; which by the terms of the contract, and by leave of the state railway commission, the Union Pacific Railroad Company had agreed to receipt in full as a donation" to Cheyenne county. It appears from the record that plaintiff has paid to the Union Pacific Railroad Company \$1,087.14 for freight on the bridge material over that line. Cheyenne county refused to accept the goods or receive the receipted freight bills, hence the plaintiff was compelled to pay the freight. This amount, under the terms of the contract, plaintiff is entitled to receive from Cheyenne county in addition to the contract price for which judgment has already been directed.

Morrill county has also requested a modification of the opinion. Its principal complaint is that, while by the opinion Cheyenne county is compelled to pay for the

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bridge, it retains all the money in the bridge fund. As the judgment is now modified Cheyenne county is required to pay \$9,359.29, with interest, to plaintiff. There is a difference of about \$700 between one-third of the cost of the bridge and one-third of the bridge fund on hand at the time of the division of the county. Since it is stipulated that the relative assessed valuation of the two counties was two-thirds and one-third, respectively, under the provisions of section 16, art. I, ch. 18, Comp. St. 1911, the balance remaining in the bridge fund must be divided in this proportion, and the opinion must be modified so as to allow Morrill county to recover one-third of the net amount remaining in the bridge fund after the plaintiff's judgment and costs are fully paid.

With respect to the request of Morrill county that it be relieved from the burden of paying interest, this should not be allowed. If it were not for the positive provisions of the statute referred to, we should adhere to our former opinion, since we consider that Morrill county is getting all that it is in justice, and perhaps more than it is in equity, entitled to.

Our former judgment is modified, and the cause reversed and remanded, with direction to the district court to render judgment in accordance with the former opinion, as now modified, in favor of the plaintiff and Morrill county.

FORMER OPINION MODIFIED.

NICHOLAS AEBIG, APPELLANT, v. W. M. BINSWANGER,
APPELLEE.

FILED APRIL 20, 1912. No. 16,682.

1. **Appeal:** CONFLICTING EVIDENCE. Where, in a law action, the evidence is conflicting, and there is sufficient to sustain the finding made by the trier of fact, such finding will not ordinarily be molested upon appeal.

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2. **Sales: DELIVERY: EVIDENCE.** The evidence is examined, though not set out in detail, and, considering the facts and circumstances shown, the finding that there was a delivery and surrender of possession in the sale of the property involved in the transaction is approved.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Bartos & Bartos and Hall, Woods & Pound, for appellant.

Mockett & Peterson, contra.

REESE, C. J.

This is an action by plaintiff to recover of the defendant the sum of \$1,500 paid to defendant in the purchase of a saloon, its stock and fixtures, at De Witt, in Saline county. It is alleged in the petition, in substance, that plaintiff entered into the contract with defendant by which he purchased the saloon of defendant for the sum of \$2,500, paying in cash \$1,500 on the purchase price, the possession of the saloon to be immediately delivered to plaintiff, but that defendant failed to deliver such possession and plaintiff had been deprived of the same, and that by the failure of defendant to comply with his contract in that behalf plaintiff is entitled to recover back the money so paid as money had and received. The answer admitted the sale and the receipt of the money, but denied that plaintiff had not been placed in possession, alleging that possession was delivered at the time of the sale. The reply denied these averments of the answer. Other issues were presented by the pleadings, but, as we view the case, they need not be here set out. The cause was tried to the district court without the intervention of a jury, resulting in a general finding in favor of defendant and a judgment dismissing the action. Plaintiff appeals.

Upon the question of delivery there is a sharp conflict in the evidence. It appears that one Roonfeldt, who had

previously been in charge of the saloon, had some interest with defendant in it. Upon the completion of the sale defendant and Roonfeldt executed and delivered to plaintiff a written memorandum of the sale as follows: "De Witt, Nebraska, 12-23-1907. Sold my saloon interest to Nick Aebig my saloon at De Witt, Neb., including stock of liquors, wines, cigars, and all goods contained in the saloon building. (Signed) W. M. Binswanger. Hy. Roonfeldt." Plaintiff gave defendant a check for the \$1,500, when defendant and Roonfeldt went to the bank, cashed the check, defendant paying Roonfeldt \$500 previously agreed upon as due him. In the meantime plaintiff put on an apron, such as worn by bartenders, and took his position behind the bar. Defendant and Roonfeldt returned to the saloon, when Roonfeldt passed behind the counter and resumed his labors as bartender. This transaction occurred on the 23d day of December, 1907. The interest of Roonfeldt grew out of the fact that the license was in his name and he was to receive as his wages the sum of \$50 a month and 25 per cent. of the profits. The cost of procuring the license and the bond was paid by defendant. It was agreed that the services of Roonfeldt should be retained until the expiration of the license the following May, defendant guaranteeing his wages until that time upon condition that he would remain sober, which he did not always do. Defendant did not reside at De Witt, and upon the completion of the transaction he left on a train which soon passed through the town. Defendant testified that the possession of the saloon was surrendered to plaintiff. This is denied by plaintiff. The district court evidently found that the delivery of possession was made, and we think the facts and circumstances shown justified the court in coming to that conclusion. It appears that Roonfeldt was a hard drinker, often intoxicated, and not overconscientious in his dealings. There is some evidence tending to prove that the next day after the sale and the receipt by him of the \$500 for his interest in the saloon, he excluded plaintiff from

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any control over the business of the saloon, and continued to do so from that time on, but no efficient means were adopted by plaintiff for the protection of his rights. These facts, if true, would not justify plaintiff in abandoning his purchase and suing defendant for the return of the money paid. Plaintiff was well acquainted with Roonfeldt before the transaction and knew his habits.

We see no reason why the judgment of the district court should be molested. It is therefore

AFFIRMED.

FIRST NATIONAL BANK OF SUPERIOR, APPELLEE, v. J. F. BRADSHAW ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,683.

Pledges: LOSS OF LIEN. In the absence of fraud or a special bailment, a pledge will be deemed to be waived or lost by the surrender of the pledged property by the pledgee.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

J. H. Grosvenor, for appellants.

Stubbs & Stubbs, contra.

REESE, C. J.

This is an action to foreclose the lien of an alleged pledge of certain shares of the capital stock of plaintiff, which it is alleged were pledged to plaintiff to secure the payment of certain promissory notes made to plaintiff by H. N. Bradshaw in his lifetime, but who is now deceased. A trial was had to the district court, which resulted in findings in favor of plaintiff and decree for the sale of the stock. Defendants appeal.

It is not deemed necessary to set out, nor to even refer to, the pleadings, as they are in the usual form, since, as we view the case, it must be disposed of upon the facts either admitted or conclusively shown by the evidence. A brief history of the case will render it more easily understood.

On the 25th day of October, 1893, a certificate for 74.42 shares of the capital stock of plaintiff was issued to H. N. Bradshaw, and on the 26th day of July, 1894, another certificate was issued to him for 3.33 shares of stock, making in the aggregate 77.75 shares held by him. Without so deciding, we will assume that those certificates were pledged to secure certain indebtedness due plaintiff upon his promissory notes held by it. The capital stock of the bank was \$100,000, represented by shares of the par or face value of \$100 each. Later on it was found that the capitalization of the bank was greater than its business and condition required, and, by the consent of the controller of the currency, it was scaled down to \$50,000, and stock issued for one-half the number of shares of the first issue. On the 10th of January, 1901, the original certificate having been canceled, a certificate for 38.875 shares was issued to H. N. Bradshaw. On the 21st day of the following February (1901) H. N. Bradshaw died, the last named certificate being in the bank, as were a number of other papers belonging to the decedent. Some time shortly after his decease the bank delivered to his widow, Mrs. E. J. Bradshaw, a number of papers belonging to the decedent, and among which was the certificate of stock of the date of January 10, 1901, on the back of which was written, "Left as security to note of H. N. B. Bo (to?) Bank. C. E. A." (C. E. A. are the initial letters of C. E. Adams, the cashier of the bank. There was no indorsement or transfer by H. N. Bradshaw.) The certificate was retained by Mrs. Bradshaw in her possession until the 2d day of January, 1906, nearly five years, and during which time the surplus of dividends, after the payment of interest upon the notes of H. N. Bradshaw, was paid to

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her and by her distributed to the heirs of his estate. On the said 2d day of January, at the suggestion of the bank officers, she surrendered the certificate in her possession to the bank, and it was indorsed, "Canceled by reissue to E. J. Bradshaw, No. 209. 1-2-06," and a certificate was issued to her, in her name, for an equal number of shares. On the 5th day of January, 1906, that certificate was assigned by her to "the estate of H. N. Bradshaw," the assignment being witnessed by C. E. Adams, the then president of the bank, and soon thereafter she delivered the certificate to J. F. Bradshaw, the administrator of the estate of H. N. Bradshaw, deceased, and he has retained its possession ever since; it being shown that it was in his possession at the time of the trial of this cause. From the time of the delivery of the certificate to Mrs. Bradshaw, early in 1901, to the date of the trial, the certificate had never been in the possession of the bank, either actual or constructive, nor had any information been given Mrs. Bradshaw or the administrator that the bank claimed a lien upon the stock as pledgee, no demand ever having been made for its surrender, nor did either one have any knowledge that such lien or pledge was claimed, nor did the bank ever take, or cause to be taken, any steps to obtain the possession of the certificate.

It is contended by defendant that, assuming that the stock, as originally issued, had been pledged, the lien of the bank had been waived and lost by the surrender and the subsequent issues of the stock, as above outlined, with the total absence of any claim of a lien upon it. There is no intimation of fraud or deception on the part of E. J. Bradshaw, the widow of deceased. Did plaintiff waive its lien?

In *Mahoney v. Hale*, 66 Minn. 463, the supreme court of Minnesota, in discussing the law of pledge, say: "To constitute a pledge, the pledgee must take possession, and to retain it he must retain possession. An actual delivery of property capable of personal possession and a continued change of possession is essential. In case of a

pledge, the requirement of possession in the pledgee is an inexorable rule of law adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. * * * There must not only be an actual delivery, as distinguished from a mere pretense, but the change of possession must be continuing; not formal, but substantial."

In Jones, Pledges and Collateral Securities (2d ed.) sec. 40, it is said: "It is a well-settled principle that a delivery back of the possession of the thing pledged terminates the pledgee's title, unless such redelivery be for a temporary purpose only, or be to the pledger in a new character, such as special bailee, or agent"—and a large number of cases are cited in the note as sustaining the doctrine.

The rule is stated in 22 Am. & Eng. Ency. Law (2d ed.) 860, to be: "In general—The pledgee must not only obtain possession of the property pledged, but must also retain possession, and a delivery back of the property with the consent of the pledgee terminates the bailment and the pledgee's lien." The rule is well supported by the citation of authorities in the foot-note. See, also, *Casey v. Cavaroc*, 96 U. S. 467; *Walker v. Staples*, 5 Allen (Mass.) 34; *Walcott v. Keith*, 22 N. H. 196; *Black v. Bogert*, 65 N. Y. 601; *Collins v. Buck*, 63 Me. 459; *Kimball v. Hildreth*, 8 Allen (Mass.) 167; *Thompson v. Dolliver*, 132 Mass. 103; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Smith v. Sasser*, 49 N. Car. 43; *Hickok v. Cowperthwait*, 122 N. Y. Supp. 78, 137 App. Div. (N. Y.) 94.

In *Harding v. Eldridge*, 186 Mass. 39, it is said: "It is uniformly held that by a contract of pledge only a special title passes to the pledgee, which depends on actual possession, while the general right of property remains in the pledgor, and in order to hold and preserve his lien there must be not only a physical delivery, where the chattel can thus be transferred, but continued possession also retained"—citing cases.

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As we have seen, the certificate for the 38.875 shares was issued to H. N. Bradshaw on the 10th day of January, 1901, and remained in the bank until after his death, which occurred February 21, 1901. Soon after his death the certificate was delivered to Mrs. Bradshaw, and she retained the exclusive possession of it until about the 2d day of January, 1906, a period of nearly five years, during which time the surplus of dividends, after paying interest on the notes, was paid to her, and during which time no intimation was ever conveyed to her that a lien or pledge was claimed. On the last named date she surrendered the certificate, and one was issued to her in her name and delivered to her, which she retained for a short time, when she transferred and delivered it to the administrator of the estate of H. N. Bradshaw, who retained its possession from that time on. No demand was ever made for its possession, nor was any claim of pledge made. Under all authority this must be held to have been a waiver of any lien which might have existed during the life of Dr. Bradshaw. It is unfortunate to plaintiff that we must so hold, for, if Dr. Bradshaw owed the bank at the time of his decease, every principle of honor would require that the debt be paid, but payment cannot be enforced by this action without running counter to the great weight of authority. Payment will have to be enforced by a resort to the assets of his estate, if at all.

It follows that the decree of the district court will have to be reversed and the cause remanded for further proceedings, which is done.

REVERSED.

LEITON and SEDGWICK, JJ., not sitting.

AMANDA CARLSON ET AL., APPELLANTS, V. CITY OF SOUTH
OMAHA ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,901.

1. **Appeal: ABSTRACTS.** In preparing abstracts of cases, section 675f of the code and the rules of the supreme court should be consulted and followed. The substance of the transcript and bill of exceptions should be preserved, the testimony of witnesses reduced to narrative form, excluding immaterial matters, but the conclusion of counsel as to what is shown should not be stated.
2. **Municipal Corporations: STREET IMPROVEMENTS: PAVING DISTRICTS.** As shown by the only available evidence, Missouri avenue in South Omaha extends continuously throughout the whole paving district, and it does not appear that the district includes parts of three different and distinct streets.
3. ———: ———: ———: **DISCRETION OF CITY COUNCIL.** The fact that the street to be paved is of different levels does not present a question for decision by the courts. Streets of considerable length are seldom of the same level throughout, and the propriety of or necessity for their pavement is for the discretion and judgment of the tribunal authorized by law to provide for the improvement.
4. ———: ———: ———: **SUFFICIENCY OF ORDINANCE.** The ordinance establishing a paving district provided that the district should include all the territory on each side of the street named and back to the middle of the block on each side thereof. The record showing that the land on either side of the street was platted into blocks throughout the whole length of the district, it is *held* that the ordinance, under the South Omaha charter, though not skilfully drawn, is sufficiently specific.
5. ———: ———: **ESTIMATE OF COST.** The estimate of the total cost of paving required by statute to be presented to the council by the city engineer and which was submitted by him is set out in the opinion, and *held* sufficient, the same being approved and acted upon by the council.
6. ———: ———: **REGULARITY OF PROCEEDINGS.** The fact that, after a public improvement is legally ordered and partly constructed under a contract, a new contract for the remainder of the work is entered into cannot affect the legality of the first steps taken by which the improvement was authorized and required.

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APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

E. T. Farnsworth and *E. R. Leigh*, for appellants.

S. L. Winters and *H. C. Murphy*, *contra.*

REESE, C. J.

This is an action to cancel special assessments levied to cover the cost of paving Missouri avenue in the city of South Omaha. The cause was tried to the court and resulted in a finding and judgment in favor of the defendants. Plaintiffs appeal.

The abstract is quite imperfect and does not comply with any rule of the court, nor with the statute. It is provided in section 675f of the code, that the appellant shall prepare a printed abstract of the transcript of the record and bill of exceptions in which the substance of the transcript and bill of exceptions only shall be stated, and that the abstract, when filed, shall be presumed to contain the whole record, unless the correctness or sufficiency be denied by the opposite party, and in which case the denying party may file a supplemental abstract. No such supplemental abstract has been filed and the presumption provided by the statute prevails. However, the abstract filed is clearly not complete, as it contains no condensed statement of the contents of the transcript and evidence as required by rule 16 (89 Neb. vii) of this court, but rather the conclusion of counsel as to what is shown, without any reference to the page of the record where the testimony or exhibits may be found, with perhaps two exceptions referring to exhibits. This limits our inquiry to such propositions, but which are the vital questions involved.

It is said in the abstract that "the chief grounds relied upon are that ordinance No. 1,393, which defines the boundaries of the district, are vague, indefinite and uncertain; the statute under which the city paved the street

without a petition had been repealed before the final contract was executed; the paving district includes parts of three different and distinct streets, of different widths and different levels, the lots on Missouri avenue being above grade and those on L street or West Missouri avenue being 60 feet below grade and having no value; Missouri avenue is 60 feet wide and L street is 80 feet wide," etc.

As there is no abstract of the oral testimony, we are limited to the map or plat of Missouri avenue, which is sufficiently referred to, and by it we find that the avenue extends the whole distance of the paving district from Thirteenth to Twenty-fourth streets, and we can find no reference to L street or West Missouri avenue. It does not appear, therefore, that "the paving district includes parts of three different and distinct streets." What the rule would be if that were shown we need not inquire. The fact that the street varies in width is not deemed material, if true, as it is not contended that there is a variance in width of the paving. It is shown by the map that Missouri avenue extends westward from Thirteenth street to Twentieth street where it "buts" against about the middle of block 123, and is then deflected southward to the south side of the block and is continued to the westward. Since this is shown to constitute a part of the avenue, we may presume that such is the fact. The claim that the avenue is of different levels cannot be material, since it is seldom that a street of any considerable length can be found of the same level throughout, and the question of the propriety of paving streets, whether of the same or different levels, must necessarily be left to the judgment and discretion of the council and those interested where petitions are necessary. No petition was required in this case.

As said in the abstract, the chief ground relied upon for relief is that ordinance No. 1,393, which defines the boundaries of the district, is vague, indefinite and uncertain. The ordinance, omitting the formal parts, is as follows: "Section 1. That improvement district No. E,

being paving district number 19, be and the same is hereby created, and the limits thereof fixed and defined as follows: All that territory on each side of Missouri avenue from the east line of Twenty-fourth street to the east line of Thirteenth street, and back to the middle of the block on each side of said portion of said avenue." Passed July 31, 1905, and approved August 1, 1905. The exhibit shows that the ground is platted into lots and blocks on each side of the avenue throughout its entire length, the blocks being of the same size along its border, with the exception of block 2 on the north and block 3 on the south at the extreme eastern end and abutting on Thirteenth street, which are somewhat smaller. Sublot 5 of lot 10 is the same size of the other blocks, but is not all subdivided into lots, so that there are "blocks" on either side of the avenue the whole of the distance. The ordinance specifying that the district shall extend "back to the middle of the block on each side of said portion of said avenue" would be sufficiently specific, notwithstanding the conceded fact that the ordinance might have been much more skilfully drawn. When read in the light of common understanding, the idea is clearly presented that the district extends to the middle of the adjacent and abutting blocks on each side of the avenue. This is not in conflict with our decision in *Wiese v. City of South Omaha*, 85 Neb. 844, for in that case the ordinance extended the limits of the district "to the alley," where there was no ally within the abutting blocks—nothing which could lend any aid to the ascertainment of the boundaries of the district.

The statute under which this improvement was ordered (laws 1903, ch. 17, sec. 61) provides that before such improvements may be made an estimate of the total cost thereof, together with detailed plans and specifications thereof, shall be made by the city engineer and submitted to the council, and, if approved, shall be returned to the engineer and kept by him subject to public inspection, and the work shall conform substantially therewith, and no

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contract shall exceed such estimates. The estimate of cost as made by the engineer is set out in the abstract and is, "19,800 sq. yds. of paving at \$2.10, \$41,580; 8,000 lineal feet of curbing at 45c, \$3,600; 5,000 cubic yds. of excavation at 25c, \$1,250; total \$46,430." Signed by the engineer. This appears to have been a sufficient compliance with the statute as to the estimate of cost. There is no sufficient showing in the abstract as to the furnishing or failing to furnish detailed plans and specifications of the work, and that question is not before us.

The ordinance defining the boundaries of the district was passed July 31, 1905. The abstract does not show when the estimate of the cost of the improvement was presented to the council. It must be presumed, in the absence of proof to the contrary, that all requirements of the law were complied with and the authority of the city to cause the paving to be done was fixed by the ordinance and the steps then taken. The fact that after a part of the paving had been done a new contract was entered into with the contractor could make no difference.

Some questions are presented by the briefs which we cannot notice for the reason that they do not arise from the record before us. All presumptions are in favor of the correctness of the judgment.

The judgment of the district court is

AFFIRMED.

CHARLES LUKEHART V. STATE OF NEBRASKA.

FILED APRIL 20, 1912. No. 17,444.

1. **Criminal Law:** INSTRUCTIONS: REVIEW. "The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial." *Lackey v. State*, 56 Neb. 298.

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2. ———: ———: ———. Defendant was on trial charged with receiving stolen property knowing it to have been stolen. On the trial the court gave an instruction defining the crime of larceny. *Held*, no error.
3. ———: WITNESSES: IMPEACHMENT: REVIEW. A witness was called on the part of the defense in a trial, and against whom a prosecution was pending for stealing the property alleged to have been unlawfully received by the defendant. He denied the theft. On cross-examination he was asked if prior to the larceny he had not stated to another party, in the absence of defendant, that if stolen harness was brought to him he could secrete and dispose of it without detection. He denied the statement. On rebuttal the state was allowed to call the party to whom the statement was alleged to have been made, and he testified to the statement. The evidence was admitted for the purpose of impeaching the witness who denied making the statement. *Held*, if erroneous, it was without prejudice to the defendant.
4. New Trial: NEWLY DISCOVERED EVIDENCE: REVIEW. Where one of the grounds for a motion for a new trial was newly discovered evidence, and the motion was submitted on conflicting affidavits, the decision of the trial court thereon will not be reversed unless manifestly wrong.
5. Trial: QUESTIONS FOR JURY. Questions of fact on conflicting testimony are for the solution of the trial jury.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed*.

Thomas L. Sloan and Herman Freese, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

REESE, C. J.

This is a proceeding in error by plaintiff in error, whom for convenience will hereafter be referred to as defendant, to reverse the judgment of the district court for Thurston county, by which he was adjudged guilty of having stolen property of the value of \$35.50. The county attorney filed an information in the district court consisting of two

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counts: The first, charging defendant with having stolen the property; the second, for receiving and buying the same knowing it to have been stolen. At the commencement of the trial the county attorney dismissed the prosecution as to the first count, and defendant was placed upon trial on the second count alone, which charged him with receiving and buying a set of harness of the value of \$50, the personal property of John Summers, then and there lately stolen from the said Summers, the said defendant well knowing the property to have been stolen. The jury having returned a verdict of guilty and finding the value of the property to be \$35.50, the defendant was sentenced to confinement in the penitentiary for the indeterminate term of from one to seven years.

Complaint is made of the action of the court in the giving of the sixteenth instruction, given by the court upon its own motion. An examination of the motion for a new trial, filed in the district court, discloses the fact that the giving of this instruction was not assigned as one of the grounds of the motion, and by the well-known rule of practice we are precluded from discussing it. *Lackey v. State*, 56 Neb. 298, and cases there cited. Instruction numbered 15 is complained of, but we find no reference to it in the motion for new trial, and it need not be noticed.

Complaint is made of the giving of instruction numbered 8. This instruction defines the crime of larceny. It is insisted that the giving of the instruction was prejudicially erroneous as the accused was not on trial for that offense. There is no objection to the correctness of the instruction as an abstract statement of the law, but it is maintained that, as defendant was not on trial for the larceny, the instruction could not be otherwise than prejudicial. The defendant was on trial for receiving stolen property. Whether the instruction was essential or not, it seems clear that it could work no prejudice to the accused. In order to find defendant guilty, it was necessary that the jury determine from the evidence that a larceny of that

property had been committed. It seems proper that they should be informed of what that offense consisted. The instruction consisted of a simple definition of larceny without any reference to the question then being tried. It was permissible for the court to inform the jury of what the crime consisted in order that they could pass upon the question of defendant's guilt or innocence intelligently.

Objection is made to the ruling of the court on an objection to the testimony of one Albert Laughlin, who was called by the state in rebuttal. A prosecution was pending against Charles Lambert for stealing the harness in dispute. He was called as a witness for the defendant and denied having stolen the property. On his cross-examination he was asked if at a certain time when he and Laughlin were on the road toward Homer he did not say in substance, in the absence of defendant, that if stolen harnesses were brought to him he could dispose of them without danger of detection or apprehension. He denied the conversation *in toto*, and also denied ever being in Laughlin's company on the road named. In rebuttal Laughlin was permitted, over the objection of defendant, to testify to the conversation, the court permitting him to do so on the ground that it tended to impeach the testimony of Lambert. It is not clear to the writer that the evidence should have been admitted in the trial of this defendant, however competent it might be in the prosecution against Lambert. But be that as it may, we are unable to see how the ruling of the court could work any prejudice to defendant. We may assume that the court erred in overruling the objection, and yet the error would not call for a reversal of the judgment if not prejudicial. We are unable to see how his rights could be prejudiced by the admission of the testimony referred to.

One of the grounds contained in the motion for a new trial was that of newly discovered evidence. This is supported by two affidavits, and is to the effect that after the close of the trial in this case the affiants J. E. Beam and Rolland L. Burke were in the county jail where Laughlin

was confined when he was asked why he had testified falsely against defendant, and his answer was that he had "gotten into trouble himself and he was almost crazy to get out of it, and he had to do something, and they had promised to let him go if he would help them to stick these two fellows (Lambert and defendant). Said Laughlin expressly admitted that he had sworn falsely at some one else's request, but did not mention who." The statement attributed to Laughlin is denied by him in the most positive terms in an affidavit. An affidavit was filed by the county attorney showing that Burke had been convicted of a felony, and was confined in the county jail awaiting his commitment to the penitentiary at the time he claimed the statements were made by Laughlin, and had previously been confined in penitentiaries of other states. It will thus be seen that the evidence was conflicting, and at least two of the affiants had been before the court on trial for felonies and convicted. This conflict was for solution by the court, and we cannot say that the finding and decision were wrong. *Russell v. State*, 66 Neb. 497; *Hill v. State*, 42 Neb. 503; *Carleton v. State*, 43 Neb. 373.

The testimony upon the trial was conflicting on many material parts of the case, and this is especially true as to the value of the property and the knowledge on the part of defendant as to it having been stolen, but these questions were submitted to the jury, and their findings thereon will have to stand.

Being unable to detect any error in the record, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

EMILY A. JONES, APPELLANT, V. RUDOLPH KNOSP ET AL.,
APPELLEES.

FILED APRIL 20, 1912. No. 16,668.

1. **Judgment: RES JUDICATA: DEFENSE OF COVERTURE.** In an action against a married woman and another, as joint makers of a promissory note, which contains nothing from which it may be inferred that she is a married woman, that she signed the note as security for her husband, that she did or did not intend to thereby bind her separate estate, or that she did not directly receive the consideration therefor, if she fails to avail herself of the defense of coverture, and allows a judgment to be rendered against her as such joint maker, she is conclusively bound thereby, and is estopped to afterwards avail herself of the matters which constitute such a defense.
2. ———: ———. If she suffers her separate property to be sold on execution based on such judgment, she cannot thereafter maintain an action in equity to set aside a sheriff's deed to the purchaser for any reason that was available to her as a defense to the action in which the judgment was rendered.
3. ———: LIEN. A judgment of a justice of the peace, filed and indexed in the office of the clerk of the district court, is a lien upon after-acquired property, and such property is subject to the levy of an execution in satisfaction thereof.
4. ———: RES JUDICATA: PROCESS: NAMES. If process in an action is served on the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigations he may be connected with the suit or judgment by proper averments.
5. ———: ———: ———: ———. In such a case the defendant should appear and object by motion, in the nature of a plea in abatement, to being designated by another than his true name. Failing to do so, he will be concluded by the judgment, notwithstanding the misnomer.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

M. A. Hartigan, for appellant.

J. A. Gardiner and John C. Stevens, contra.

BARNES, J.

Action to set aside a sheriff's deed and quiet the title, in the plaintiff, to certain lots in the city of Hastings. The defendants had the judgment, and the plaintiff has appealed.

The evidence which was received by the trial court, over defendants' objections, shows the existence of the following facts: In the year 1901 plaintiff, a married woman, and her husband resided in the city of Hastings. The husband was engaged in the business of repairing wagons, and to carry on his trade he borrowed \$100 of the defendant Norton, and gave his promissory note therefor, payable in one year from its date. Certain payments were made thereon, which reduced the indebtedness to \$70. When the note became due the maker was unable to pay it, and after waiting some time Norton agreed to an extension of one year if Jones would give him a new note signed by himself and his wife. The note was executed by the plaintiff and her husband. It was not paid when it became due, and suit was brought thereon in the justice court of Adams county against the joint makers, the plaintiff being named or described in that suit as "Emma A. Jones." Personal service of summons was made on the plaintiff, and service upon her codefendant was made by leaving a copy of the summons at his usual place of residence. Both of the defendants defaulted, and a judgment was rendered against them in that action for the sum of \$77.93. Shortly after the judgment was obtained it was transcribed to the district court for Adams county, and was duly filed and indexed by the clerk of that court. At that time, and for nearly a year thereafter, the plaintiff had no separate estate and no property in her own right of any kind whatsoever. Within a year after the transcript was filed the plaintiff inherited some property from her father's estate, and with it purchased the lots in question, which were conveyed to her by a deed of general warranty, in which she was described by the name of

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"Emily Amanda Jones." On the 8th day of December, 1908, an execution was issued by the clerk of the district court upon the transcribed judgment and delivered to the sheriff of Adams county. It was levied upon the lots in question; they were appraised, advertised and sold, and were purchased by the defendant Knosp. In due time the sale was confirmed, and by the direction of the district court the sheriff executed a deed of the premises to the purchaser. It appears that when confirmation was applied for the mistake or discrepancy of the plaintiff's name was ascertained, and when the order of confirmation was made the court endeavored to correct this discrepancy without the service of notice of any kind upon the plaintiff. After the introduction of the evidence there was a general finding in favor of the defendants, and upon that finding this action was dismissed.

It is contended by appellant that, notwithstanding the undisputed facts above recited, the defense of coverture, which she might have successfully made in the suit upon the note, is still available to her in this collateral action; that the transcribed judgment never became a lien upon her after-acquired property, and that such property was not subject to levy and sale thereunder.

It is apparent that appellant's first contention entirely ignores the binding force and conclusiveness of the transcribed judgment which was rendered against her in the action on her promissory note. It must be observed that it was not shown that there was anything contained in that instrument which indicated that she was a married woman, that she signed it as security for the payment of her husband's debt, that she did or did not intend to bind her separate estate, that she was not the principal maker thereof, or that she did not directly receive the consideration therefor. If any of the facts on which she bases her present contention existed, she should have appeared in that action and made her defense known to the court. If she had appeared and defended, the matters of which she now seeks to avail herself would have been

a complete defense, but having failed to thus assert her rights she is fully concluded by the judgment of that court. The rule is well settled that the doctrine of *res judicata* "applies not only to the points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time." *First Nat. Bank v. Gibson*, 74 Neb. 232. "A judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose." *Lowe v. Prospect Hill Cemetery Ass'n*, 75 Neb. 85. It is also well settled that a judgment by default is just as conclusive between the parties, upon all matters necessary to support the judgment, as one rendered after answer and contest. 2 Black, Judgments (2d ed.) sec. 508; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683.

It was contended on the hearing that the plaintiff was not served with summons in the action upon the note, and the record discloses that she testified that no summons was ever served upon her. We find, however, that her testimony was not only disputed by the record itself, but the officer who served the summons testified in this case that he was acquainted with the plaintiff, and that he actually delivered to her a copy of the summons at the time and in the manner recited in the record. It follows that this contention must fail; and, while the situation is a regrettable one, it seems to have been caused either by the neglect or ignorance of the plaintiff herself, from which we are unable to give her any relief.

It is further contended that the transcribed judgment never became a lien upon the lots in question because they were acquired by the plaintiff after its rendition, and were not subject to levy and sale thereunder. Section

477 of the code provides: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered. * * * All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution." It was held in *Colt v. Du Bois*, 7 Neb. 396, that the lien of a judgment attaches to land subsequently acquired. Section 561 of the code provides for filing transcripts of judgments rendered by justices of the peace in the office of the clerk of the district court. And section 562 provides: "Such judgment, if the transcript shall be filed in term time, shall have a lien on the real estate of the judgment debtor, from the day of the filing; if filed in vacation, as against the judgment debtor said judgment shall have a lien from the day of the filing, and as against subsequent judgment creditors from the first day of the next succeeding term, in the same manner and to the same extent as if the judgment had been rendered in the district court." Therefore, it cannot be said that the transcribed judgment was not a lien upon the lots in question, for in any event, upon levy of the execution, it became a lien thereon, and the sale thereunder regularly and lawfully made and confirmed by the district court vested the title to plaintiff's lots in the purchaser.

It was also contended that, by reason of the fact that plaintiff was designated in the transcribed judgment as "Emma A. Jones" instead of "Emily Amanda Jones," the purchaser at the execution sale obtained no title as against her to the lots in question. In 1 Black, Judgments (2d ed.) sec. 213, it is said: "It is a well established rule that if process in an action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be

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connected with the suit or judgment by proper averments." In *Kuhn v. Kilmer*, 16 Neb. 699, it was said: "Where a judgment is rendered and execution issued against Rosina Coons, it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of the defendant is shown to be Rosina Kuhn." In *Davis v. Jennings*, 78 Neb. 462, a case of misnomer, it was held, where the right defendant was actually served with a summons, that the misnomer was no ground for quashing the writ or service; that in such a case the defendant should appear and object by motion in the nature of a plea in abatement to being designated by any other than his true name. We are therefore of opinion that defendants' contention upon this point is not well founded.

Finally, we may say that we have not overlooked *Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Kocher v. Cornell*, 59 Neb. 315, and other cases of a like nature. But it must be observed that in those cases the defense of coverture was interposed in due time and before final judgment.

From the foregoing it seems clear that the judgment of the district court was right, and is therefore

AFFIRMED.

LORENCE BOWERS, APPELLANT, V. CHICAGO, BURLINGTON
& QUINCY RAILROAD COMPANY, APPELLEE.

FILED APRIL 20, 1912. No. 16,678.

1. **Negligence:** PLEADING: BURDEN OF PROOF: INSTRUCTIONS. Where a plaintiff pleads and relies upon one or more specific acts or omissions as negligence, which are denied by the defendant, and the petition contains no general allegation of negligence, the burden of proof is upon the plaintiff to establish the affirmative of that issue, and evidence of other acts of negligence may properly be excluded, and it is not error to so instruct the jury.

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2. **Carriers: INJURY TO LIVE STOCK: RIGHT OF RECOVERY.** One not an owner of, and not beneficially interested in, an animal alleged to have been injured by the negligence of another, and who has no assignment of the owner's right of action, cannot recover for such injury, and an instruction to that effect is proper.
3. **Trial: INSTRUCTIONS: FAILURE TO REQUEST.** A party, in order to predicate error on a failure of the court to instruct the jury with reference to his theory of the case, must tender an instruction on such theory.
4. **Evidence examined, and found sufficient to sustain the verdict.**

APPEAL from the district court for Cass county:
HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Matthew Gering, for appellant.

Byron Clark and William A. Robertson, contra.

BARNES, J.

Action in the district court for Cass county for damages to plaintiff's live stock and household furniture alleged to have been sustained by defendant's negligence as a common carrier in transporting the property from Spencer, in Boyd county, to Cedar Creek, in Cass county, Nebraska. The defendant had the verdict and judgment, and the plaintiff has appealed.

It appears that the plaintiff chartered a box-car of the Chicago & Northwestern Railroad Company at Spencer, in which he placed his live stock, consisting of a stallion, a gelding, a pony, one cow, about 75 chickens, and some household furniture, and routed the car to Omaha, and thence over defendant's railroad to Cedar Creek; that he was furnished transportation for one person to ride in the car as a caretaker, and his son assumed that duty under the contract of shipment. It also appears, without dispute, that the caretaker rode in the way-car, and paid no attention to the shipment until it arrived at Omaha. There is a conflict of evidence as to whether the son rode in the car and cared for the shipment from that point to

Cedar Creek, or whether he rode in a passenger coach attached to the train in which the box-car was placed. It was alleged in the petition: "Said defendant did not safely carry and deliver said horses, pony, cow, cupboard, chairs, chickens and other personal property, as it had undertaken to do, but, on the contrary, conducted itself so carelessly in and about carrying and transporting the same that at its switch yards in the city of Plattsmouth, Nebraska, the defendant, its agents and servants, well knowing the contents of said car, carelessly and negligently pushed, switched and propelled said car with unnecessary and unusual violence against other cars, and so carelessly and negligently operated its locomotive, cars and train that the said horses, pony, cow and other property herein described were violently thrown upon and against said car and each other, so that, in consequence of said negligence, said Percheron stallion received injuries of which he died on the 22d day of March, 1909, and the other horse and pony injured and bruised, one dozen chickens killed, the cupboard, chairs, rocking-chair and other household furniture injured to the damage of the plaintiff in the sum of \$1,186," for which the plaintiff prayed judgment. This statement was denied by the answer. The petition contained no other allegation of negligence or damage whatsoever.

It was shown by the evidence that shortly after the shipment arrived at Cedar Creek the stallion showed signs of distress and illness, from which he afterwards died. There was some evidence tending to show that the other horses and the cow were bruised to some extent; that some of the chickens died, and that the furniture was also scratched and damaged. The caretaker testified that up to the time the car reached Plattsmouth all of the shipment was uninjured, and the live stock was in good condition. He also testified that while the car was in the yards at that place it was so roughly handled that the horses and cow were thrown down, and the furniture was damaged to some extent. His last statement was flatly

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contradicted by the defendant's witnesses, and the jury, by their verdict, resolved that question against the plaintiff.

The record also contains evidence from which the jury might reasonably have concluded that the illness and death of the stallion was caused by confinement in the car, lack of feed and water and want of proper attention on the part of the caretaker.

It is plaintiff's contention that the district court erred in giving the jury paragraphs 3, 9, 13 and 14 of the instructions given on his own motion. The first three instructions complained of were alike in substance, and may be summarized by quoting paragraph 9, of which complaint is made. That instruction reads as follows: "You are instructed that the plaintiff must show by a preponderance of the evidence, before he can recover, that the proximate cause of the death of the plaintiff's stallion and the damage to the other property in the car, if any there was, was the careless and negligent manner in which the defendant's agents and servants switched and handled said car and handled said property at Platts-mouth, and it is immaterial in what manner defendant handled the car at Platts-mouth, unless you believe that such negligent and careless handling at said place caused the sickness from which the stallion died, and unless the plaintiff has shown by a preponderance of the evidence that said stock and personal property was injured on account of the rough handling of the car in which it was carried while it was being shipped, which was not ordinarily incident to the handling of cars so being switched and handled by engines, your verdict will be for the defendant."

Counsel for the plaintiff concedes that the live stock in question was transported under a contract between the plaintiff and the defendant in charge of a caretaker or attendant, and that if by reason of his negligence or the natural propensities of the live stock, under the conditions in which it was surrounded, it injured itself, then

defendant would not be liable, and that, in order to recover for such injuries, the burden of proof was on the plaintiff to establish by a preponderance of the evidence the specific allegations of negligence contained in his petition. But it is argued that as to the household goods, or inanimate property, the burden was upon the defendant to prove that the injury, if any, to such property was caused either by an act of God or the public enemy. It may be conceded that, if the plaintiff's petition had contained a general allegation of negligence, this contention would have been well founded. But, as above shown, the plaintiff saw fit to confine his allegations and proof to the specific act of negligence in the handling of the car in question in the defendant's yards at Plattsmouth. He rested his whole right to recover, both as to live stock and inanimate property, upon this ground alone. He alleged his damages in a lump sum without separating the items, and therefore he is in no position to complain of instructions which conform to the issue made by the pleadings and the evidence which he offered to sustain it.

In *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726, it was said: "The burden of proof to establish the affirmative of an issue involved in an action rests upon the party alleging the facts constituting that issue, and remains there until the end." *Union P. R. Co. v. Porter*, 38 Neb. 226; *Omaha Street R. Co. v. Clair*, 39 Neb. 454. "Where a pleader relies upon one or more specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant." *Omaha & R. V. R. Co. v. Wright*, 49 Neb. 456.

In *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, it was said: "In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence." The opinion in that case makes a clear distinction between cases where the live stock is committed exclusively to the care of the

common carrier, and where it is shipped under a contract by which the owner in person or by his employees accompanies the stock for the purpose of caring for it during transit. It was there said: "We think these cases establish the rule in this jurisdiction that, where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier." This rule is sustained by the courts in other jurisdictions. *Hanley v. Chicago, M. & St. P. R. Co.*, 134 N. W. (Ia.) 417; *Mosteller v. Iowa C. R. Co.*, 133 N. W. (Ia.) 748.

Plaintiff admits this to be the correct rule, for in his brief he says: "As to the transaction which took place in the yards at Plattsmouth, there is conflict in the evidence, and for the purpose of this appeal it must be assumed that the verdict of the jury of the nonexistence of negligence on the part of the railroad company was established." This being conceded, and the jury having found against the plaintiff upon the only ground on which he could recover under his pleadings, and the plaintiff having tendered no request for an instruction stating his present theory of the case, he is not in a position to challenge the correctness of the instructions complained of.

Error is assigned for giving instruction 14, at the request of the defendant, which reads as follows: "You are instructed not to allow any damages to plaintiff on account of the pony, in this action." An examination of the record discloses that a Mrs. Wooster, who testified for the plaintiff, stated that the pony belonged to her; that it was her personal property, and was bought by her own money; that the plaintiff had nothing to do with it in any way of ownership. There is no evidence in the record showing, or tending to show, that her claim had been assigned to, or was the property of, the plaintiff. Therefore the court did not err in giving that instruction.

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A careful examination of the record convinces us that the cause was fairly tried, and the verdict of the jury is sustained by the evidence. Therefore, the judgment of the district court is

AFFIRMED.

BENJAMIN TAIT, APPELLANT, v. ROBERT B. REID,
APPELLEE.

FILED APRIL 20, 1912. No. 16,681.

1. **Appeal: MOTION FOR NEW TRIAL: REVIEW.** When it is sought to review the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree accordingly, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Johnson v. Songster*, 73 Neb. 724.
2. **Pleadings examined, and found sufficient to sustain the judgment of the district court.**

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

William E. Shuman, for appellant.

L. E. Roach and Crissman, Linville & Churchill, contra.

BARNES, J.

Action in the district court for Lincoln county upon a foreign judgment aided by an attachment and garnishment.

It appears that the defendant, who formerly resided in the state of Iowa, on the 11th day of September, 1909, entered into an agreement with one Taylor of Cedar Rapids, in that state, to purchase a tract of land known

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as the Taylor addition to North Platte, in Lincoln county, Nebraska, of which Taylor was the owner, for an agreed consideration of \$13,000, of which defendant paid the sum of \$400. Taylor retained the legal title, but agreed to convey the land to the defendant Reid upon the payment of the balance of the purchase price. By the terms of the agreement Reid was to have the right to enter upon the premises for the purpose of showing lots and making sales thereof. That on or about the 12th day of September of that year defendant and his wife removed from their home in Cedar Rapids, Iowa, to North Platte, Nebraska, to engage in the business of selling real estate; that before defendant left the state of Iowa the plaintiff had obtained a judgment against him in the courts of that state; that on or about the 2d day of February, 1910, plaintiff commenced this action upon that judgment, in the district court for Lincoln county, and obtained a writ of attachment therein, which the sheriff attempted to levy upon the real estate above described, and garnishee process was served upon the bank in North Platte, where defendant and his wife each had money on deposit. Personal service was had upon the defendant Reid, who, after entering his appearance, filed a motion to dissolve the attachment for the reason, among others, that his interest in the real estate, if any, was not subject to execution or attachment. Upon the trial of the cause the district court rendered judgment for the plaintiff, ordered the bank to pay the money in its possession into court, but dissolved the attachment so far as it related to the real estate, upon the ground, and for the reason, above stated. From that part of the judgment the plaintiff has brought the case to this court by petition in error.

In 1907 the legislature passed an act to provide for appeals to the supreme court in civil cases, and repealing the statutory provisions then existing for the prosecution of proceedings in error to the supreme court. Laws 1907, ch. 162. Since that law went into effect civil cases can only be brought to this court upon appeal. There was no

motion to dismiss the proceeding, and the defendant filed his answer within the time allowed by law. No objection was interposed by the parties, and therefore the case will be treated as though it were brought here by appeal.

An examination of the record discloses that the question here presented was tried upon its merits; that evidence was introduced in the form of affidavits and counter affidavits, together with considerable oral testimony showing or tending to show the defendant's residence, his interest, if any he had, in the real estate in question, and this evidence seems to have been preserved in the form of a bill of exceptions.

The record further discloses that the plaintiff filed no motion for a new trial, and the alleged error of which he now complains was never presented to the district court for its consideration or determination. The well-established rule in such case is that this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree accordingly, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Johnson v. Songster*, 73 Neb. 724; *Storey v. Burns*, 53 Neb. 535; *Holmes v. Lincoln Salt Lake Co.*, 58 Neb. 74.

An examination of the pleadings and affidavit for attachment satisfies us that they are sufficient to support the decision of the trial court and sustain the findings and judgment appealed from.

Therefore, the judgment of the district court is

AFFIRMED.

JAMES WHELAN, APPELLANT, v. UNION PACIFIC RAILROAD
COMPANY ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 17,007.

1. **Appeal: INSTRUCTIONS.** "It is not error for the court to instruct a jury as to the legal significance of uncontradicted evidence or admitted facts." *Oelke v. Theis*, 70 Neb. 465.
2. ———: ———. Error cannot be predicated on a part of a paragraph of an instruction when the paragraph as a whole correctly states the law.
3. **Adverse Possession: TITLE TO STREETS.** The effect of chapter 79, laws 1899, is to prevent any one from obtaining title to a part of a public street in any city or village within this state by adverse possession only since the passage of that act.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

I. J. Dunn, George W. Cooper and Charles L. Dundey,
for appellant.

John A. Sheean, contra.

BARNES, J.

Action to recover the value of certain real estate in the city of Omaha of which the plaintiff claimed to be the owner, and which he alleged had been wrongfully taken from him by defendants to his damage in the sum of \$10,000, for which he prayed judgment. The defendants denied plaintiff's ownership, and alleged that the title to the land in controversy was in the city of Omaha; that it was a part of a regularly laid out public street of that city known as Eighth street; that the mayor and city council, by an ordinance duly passed and approved on the 19th day of March, 1907, had granted the defendant, the Union Pacific Railroad Company, the right to lay its tracks over, upon and across said Eighth street; that the defendant company, acting under such grant, entered

upon the premises and did nothing other than was necessary to prepare the property for its use in operating its railroad across and along said street. Plaintiff, by his reply, denied the allegations of the answer, and upon the issues thus joined the cause was tried to a jury in the district court for Douglas county, and a verdict was returned in favor of the defendants. Judgment was rendered upon the verdict, and the plaintiff has appealed.

It appears that the plaintiff, to maintain the issues on his part, introduced in evidence a contract of sale and a quitclaim deed from one Albertina Driftcorn to himself of the tract of land in question, and attempted, by oral evidence, to establish his title by adverse possession in himself and his grantor for more than ten years next before the commencement of the action.

Plaintiff's first contention is that the court erred in permitting the defendants to cross-examine the witnesses Albertina Driftcorn and her husband in relation to statements they had made at different times to various persons to the effect that plaintiff did not own the land in controversy, that it belonged to Charles Driftcorn; and also in admitting a letter in evidence written for Mrs. Driftcorn by her son to one of the defendants, in which she stated that the land was owned by Charlie Driftcorn, and warned defendant not to buy the property from the plaintiff for that reason.

It appears, without dispute, that the plaintiff had no title to the land in question other than such as he obtained from Mrs. Driftcorn; that her title, if any, was acquired by adverse possession for a period of ten years prior to July 1, 1899; and that during the pendency of this action she executed the quitclaim deed to the plaintiff in consideration of a part of his recovery, if any there should be. Therefore, her statements as to the length of time she occupied the property in controversy and her statements relative to her occupancy and ownership thereof were relevant to the main issue in the case, and this contention is not well founded.

Plaintiff alleges error for the giving of instruction No. 7, which, in effect, withdrew from the jury the issue as to whether the land in question was located in, and was a part of, Eighth street. By the plaintiff's evidence, and by the plat found in the bill of exceptions, it clearly appears that the land in controversy is situated wholly in Eighth street in the city of Omaha, and the plaintiff is bound by his own evidence. That fact was also proved by other witnesses, and we find no competent evidence in the record by which it is seriously disputed. Such being the condition of the evidence, it was proper for the trial court to withdraw that question from the consideration of the jury. "It is not error for the court to instruct a jury as to the legal significance of uncontradicted evidence or admitted facts." *Oelke v. Theis*, 70 Neb. 465; *McDonald v. Tootle-Weakley Millinery Co.*, 64 Neb. 577.

It is contended that the court erred in giving instruction No. 6. It appeared from the testimony that plaintiff's grantor erected a shack or small shed upon the land in question, and it was claimed that she thereby took possession of the entire tract. The instruction complained of was given in view of that situation. It appears, however, that only a part of the instruction is quoted in plaintiff's brief and assailed by him as erroneous. An examination of the record discloses that the instruction, as a whole, correctly states the law in such case. Error cannot be predicated on a part of an instruction when the instruction as a whole correctly states the law.

Finally, an examination of the record discloses that the main question litigated and determined in the trial court was that of adverse possession by the plaintiff's grantor, and, that question having been determined by the jury upon conflicting evidence, the verdict should not be set aside unless found to be clearly wrong. *Ohio Nat. Bank v. Gill Bros.*, 85 Neb. 718; *Landis & Schick v. Watts*, 82 Neb. 359; *Teasdale Commission Co. v. Keckler*, 85 Neb. 712.

A careful reading of the record satisfies us that the

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Driftcorns unlawfully entered upon that part of Eighth street in the city of Omaha now in controversy, and attempted to obtain title thereto by some sort of a claim of adverse possession; that the plaintiff's only interest in the land was such as they attempted to convey to him. In order for the plaintiff to have any standing whatever, it was incumbent upon him to show by a preponderance of the evidence that his grantor had been in the open, notorious, exclusive and adverse possession of the tract of land in question for more than ten years prior to the time when chapter 79, laws 1899, went into effect, and it clearly appears that the evidence does not establish that fact.

It follows that the judgment of the district court was right, and it is therefore

AFFIRMED.

E. D. MCCALL, RECEIVER, APPELLEE, V. RICHARD BOWEN
ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,922.

1. **Insurance: MUTUAL COMPANIES: INSOLVENCY: PROCEEDINGS AGAINST MEMBERS.** An action by the receiver of a mutual insurance company, organized under chapter 46, laws 1899, against the members to recover an assessment made by the court in order to pay the liabilities of the insolvent corporation may properly be brought in a court of equity in the same manner as an action by the receiver of a stock corporation against its stockholders for a like purpose, and, in such case, summons may be issued out of the county in which the action is brought to any other county in the state in which a defendant resides or may be summoned.
2. **Limitation of Actions: MUTUAL INSURANCE COMPANIES: SUIT BY RECEIVER.** Where the directors of such a corporation, before it was declared insolvent, levied certain assessments which were invalid because not made in accordance with law, and which were afterwards set aside by the district court in the proceedings to wind up the affairs of such corporation, the cause of action against members for assessments made by the receiver under

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the direction of the court was not barred, although the invalid assessments were made more than four years before the latter.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

E. P. Holmes, George L. De Lacy, J. F. Fults, J. C. McNerney, F. A. Berry, F. D. Hunker, W. L. Kirkpatrick, J. W. Purinton, E. R. Hitchcock and Tibbets, Anderson & Baylor, for appellants.

E. J. Clements, contra.

LETTON, J.

The Hog Raisers Mutual Insurance Company of Lincoln, Nebraska, was organized in April, 1899, under chapter 46, laws 1899. It did business from its organization until June, 1900, during which time it issued about 560 policies. Losses were sustained which were adjusted, audited and allowed by the company. On the 6th day of June, 1900, there was more than \$6,000 due and unpaid on the same. Judgment was recovered by a policy holder on an unpaid loss and an execution issued thereon which was returned wholly unsatisfied. Afterwards, the creditor began an action in the district court for Lancaster county, alleging the insolvency of the company, the issuance and return of the execution, that the officers of the company have failed and neglected to enforce the statutory liability of the members, or to collect from them the necessary funds to pay the judgment and the other unpaid losses, and praying for the appointment of a receiver.

Pursuant to this application the plaintiff was appointed receiver, and was authorized to make any and all assessments necessary to pay all valid obligations existing against the company, including the costs and expenses of the receivership, and to collect the assessments by suit or otherwise. In the receivership proceedings claims to the

amount of \$8,721 were presented, heard by the court, and allowed. Afterwards, the receiver, in pursuance of an order of the court, made an assessment upon each of the members for his proportionate share of the amount necessary to defray the losses and expenses. This assessment was approved, adopted and confirmed by the court, and the receiver was ordered and directed to collect the same. A number of members paid the assessment, but a large number refused to pay. This suit is brought to recover this assessment.

The petition herein alleges that the assessments as made would be sufficient to meet all claims and assessments, but that certain of the defendants have removed from the state, and others are insolvent, and that it is necessary that a court of equity take into account the losses that will necessarily result from these facts, and that, upon rendition of judgment for the full amount of the assessment, the court should determine whether execution should issue for the full liability, or whether in the first instance an execution for a part only will be adequate for the collection of the necessary amount. It is further alleged that this action is ancillary to the suit brought to wind up the affairs of the company, that separate and independent suits against each of the members would require a multiplicity of suits and excessive and unnecessary expenses, and that the plaintiff is without an adequate remedy at law. The prayer is that a several judgment be entered against each of the defendants, that the court ascertain the amount for which execution shall issue in the first instance against each defendant, and for such other relief as may be equitable.

A large number of the defendants live and were served in Lancaster county, but many are residents of other counties. Judgment was entered by default against a number of defendants. Trial was had as to the others who were served and judgments rendered against them. Eighty defendants have appealed to this court. Special appearances objecting to the jurisdiction were made and

demurrers were filed by a number of defendants residing in other counties than Lancaster upon three grounds. These demurrers for the most part set forth, first, a general demurrer; second, that the statute of limitations had run; third, that the causes of action were improperly joined. The special appearances and demurrers were overruled, but the same objections were carried forward into the answers. The answers plead certain assessments made by the directors while in control of the company, that such assessments were sufficient to cover and pay the losses sustained and the expenses incurred up to their respective dates, that the assessments now sought to be collected are to cover the same losses as the assessments made by the directors, and that the cause of action is barred by the statute of limitations.

In reply the plaintiff alleged that the assessments attempted to be made by the directors were void, and, further, that the prior assessments were by the court declared invalid and set aside and all payments made upon the same were credited to the member so paying.

The appellants argue and rely upon the propositions that the court erred in overruling the special appearances and the demurrers for the lack of jurisdiction over the person of defendants; that the cause of action is barred; and that, there being no proof of signature to the application, the evidence does not sustain the judgment.

The question as to whether the court erred in overruling the special appearances and the demurrers depends upon the question whether this is a proceeding in equity, in which all of the defendants have a common interest and where the powers of the court may be invoked to increase or diminish the amount each defendant may be compelled to contribute in order to pay the losses and expenses, or whether it is an action at law in which each defendant is entitled to a jury trial. This question must be determined from a consideration of the statute under which the corporation was organized and whereby the rights, duties and liabilities of its members were fixed. If the policy

holders in a mutual insurance company organized under the act of 1899 are, in point of fact, stockholders in the corporation, although not so denominated either in the suit or in other dealings with the company, their rights and liabilities are fixed by that relation. Under section 2 of the act all persons who take insurance in the company become and continue members during the period their insurance is in force and no longer, and it is provided that they shall sign an application obligating themselves to pay all assessments made for losses and expenses while they continue members. Section 4 provides, in substance, that each member may vote in person or by proxy for as many persons as there are directors to be elected, or to cumulate his votes or distribute them as he may think fit; section 9, that a member may be sued for failure to pay an assessment for 30 days after personal notice of the same; section 14, that any member may withdraw by giving notice of the surrender of his policy *"and paying his or her share of all unpaid claims or liabilities of such company for losses or expenses accruing while a member;"* section 15, "Bodies Corporate. Such company shall be deemed a body corporate with succession, and shall possess the usual powers and be subject to the usual duties of corporations within the limitations of this act." The liabilities of a member of a company organized under this act are fully as great as those of a stockholder in an ordinary stock corporation. It is immaterial whether the members of this body corporate be designated as members or stockholders, because during the term that their policy of insurance covers they are as essentially members of the corporate body as owners of stock in a stock corporation are of such a corporation. 2 May, Insurance (4th ed.), secs. 548, 549; *Huber v. Martin*, 127 Wis. 412; *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 60 Neb. 636; *Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co.*, 80 Minn. 125; *Morgan v. Hog Raisers Mutual Ins. Co.*, 62 Neb. 446; *Swing v. Karges Furniture Co.*, 123 Mo. App. 367.

Having reached the conclusion that the policy holders are, in their relation to the corporation and in respect to their liabilities thereto, virtually stockholders and that they occupy with respect to the unpaid assessments the same position with reference to the corporation debts that stockholders whose subscriptions are unpaid do in stock corporations, the question as to the proper method of collecting funds to pay the liabilities after the corporation is insolvent and has passed into the hands of a receiver is easily solved. In this jurisdiction it is settled law that such an action must be brought in equity by the receiver against all of the stockholders jointly. It would be a useless repetition to set forth at length the reasons for this rule. They may be found plainly set forth in the opinions in the following cases: *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *Emanuel v. Barnard*, 71 Neb. 756; *Brown v. Brink*, 57 Neb. 607; *Van Pelt v. Gardner*, 54 Neb. 701; *Fremont Package Mfg. Co. v. Storey*, 2 Neb. (Unof.) 325; *Reed v. Burg*, 2 Neb. (Unof.) 117.

Appellants rely upon the opinion of this court in *Burke v. Scheer*, 89 Neb. 80, but that case is not in point. The insurance company involved in the *Scheer* case was organized under a different statute which limits the liabilities of the members to the amount of the obligations expressed in the application, which provided that members could not be compelled to pay more, and also prescribed the form of action by which such liability could be enforced.

We are satisfied that a court of equity is the proper forum, and that summons may issue out of the district court in Lancaster county to any county in this state wherein one of the defendants resides or may be summoned; and that proper service therein will vest the district court for Lancaster county with jurisdiction.

It is next contended by a number of the appellants that the statute of limitations had run upon the cause of action against each of said defendants. The argument is made

that because the directors in 1899 and 1901 made certain assessments for the purpose of paying some of the same claims which were allowed by the court, and to pay which the assessment sued upon was levied, the cause of action accrued, and that to the amount of such assessment the bar of the statute has fallen. These assessments were not paid by the appellants. The record discloses that the assessments made by the directors did not comply with the requirements of the statute, in that they did not confine the liability of each member to the losses sustained during the time covered by his policy, and that, recognizing this fact, the attempt to enforce their payment was afterwards abandoned. The assessment was one which the board of directors had no power to make, and which they could not compel a member to submit to if he chose to resist the payment. Such an assessment could have no binding force, and cannot be set up as a defense against an attempt by the receiver to collect sufficient funds to pay the just debts of the corporation. *Davis v. Oshkosh Mutual Fire Ins. Co.*, 82 Wis. 488; *Great Western Telegraph Co. v. Burnham*, 79 Wis. 47; *Bowen v. Kuehn*, 79 Wis. 53; *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441. Moreover, upon a showing made by the receiver in the principal case and upon his application, the district court found "that all the assessments made by the defendant upon its members were irregular and not in conformity with the provision of the statute of Nebraska, and should be and the same are hereby set aside." We are of opinion that this finding and decree, having been made in a direct proceeding to which the corporation was a party, is binding upon all of its members and cannot be collaterally attacked in this ancillary proceeding. The appellants are as much bound by the proceedings of the district court in this respect as they are with respect to the allowance of claims against the corporation and to the amount of the assessments necessary to be made. We are of opinion that the statute of limitations is no bar to this proceeding in this respect.

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From an examination of the pleadings and the evidence, we are satisfied that the claim that there is not sufficient proof that the defendants signed the application is untenable. We think it unnecessary to set out at length the pleadings referred to or the evidence, but it is sufficient to satisfy us that the decree of the district court in this respect is correct.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

PHILIP S. RINE, APPELLEE, v. JOHN A. RINE, ADMINISTRATOR, ET AL., APPELLEES; WILLIAM VON GAHLEN ET AL., APPELLANTS.

FILED APRIL 20, 1912. No. 16,673.

1. **Parties: ACTIONS AFFECTING PERSONALTY OF DECEDENT.** The executor or administrator, in actions affecting decedent's personal property in due course of administration, is the proper party to prosecute or defend, but an exception to that rule permits an heir or legatee to appear in a suit to protect his own rights, where there is collusion between parties asserting adverse interests and the legal representative of decedent.
2. **Judgment: OPENING.** Under section 82 of the code, providing that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend," relief may be granted after the expiration of the five-year period, where notice was given and a sufficient showing made within the statutory time.
3. ———: ———: **AMENDMENT OF AFFIDAVIT.** In an application for relief under section 82 of the code, providing for the opening of a judgment within five years, the authentication of the affidavit in support of the application may be amended after the five-year period has expired, where the showing in other respects meets the statutory requirements and notice of the application was given within the time limited.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

S. L. Geisthardt and John W. Graham, for appellants.

Frank Dolezal and Smyth, Smith & Schall, contra.

ROSE, J.

This is an application by Wilhelm von Gahlen, Wilhelm Grunewald and Heinrich Steinacker for relief under section 82 of the code, which provides: "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend." The application was denied, and the applicants named have appealed.

The decree which applicants seek to open was rendered June 27, 1904, in a suit wherein Philip S. Rine is plaintiff. In Dodge county he owned a tract of land incumbered by mortgages aggregating \$6,000. Carl Hembeck was mortgagee, but died before the debt was paid or the present suit instituted. According to the petition plaintiff sought to determine judicially the ownership of the mortgages, to make payment of the amount due thereon, and to discharge the liens on his land. The defendants were John A. Rine, administrator of the estate of Carl Hembeck, deceased, Laura Rine, Louise Steinacker, William von Gahlen, William Grunewald and the unknown heirs of Carl Hembeck, deceased. A summons was personally served on the administrator and Laura Rine, but there was no service on the other defendants except by publication in a newspaper.

In his petition plaintiff alleged: Defendants Steinacker, von Gahlen and Grunewald are respectively niece and nephews of Hembeck and are legatees under his will. Hembeck died without issue and without leaving surviving him a wife. Defendant Laura Rine is a niece of the de-

ceased wife of Hembeck. They adopted and raised her as their daughter, and she asserts that she cared for them under an agreement that after the death of both the balance due on the mortgages should belong to her. In making a testamentary disposition of his property Hembeck omitted to change his will to conform to the agreement described, and John A. Rine as administrator claims the mortgage securities. The legatees and heirs of Hembeck are interested in the mortgages. Plaintiff prayed that defendants be required to interplead and establish their respective interests, that he be permitted to pay the debt to the parties entitled thereto, and that the liens on his land be discharged. By answer the administrator admitted that he claimed the mortgages, but otherwise denied the allegations of the petition. Laura Rine answered that she entered into and performed the contract mentioned in the petition and that she was owner of the mortgages. The other defendants made default. June 27, 1904, the trial court decreed that Laura Rine was the owner of the mortgages and granted plaintiff the relief prayed by him.

June 24, 1909, defendants von Gahlen, Grunewald and Heinrich Steinacker, the latter claiming to be the sole surviving heir of defendant Louise Steinacker, who died April 22, 1899, filed a motion to vacate the decree on the ground that they had no knowledge or notice of the action or opportunity to make a defense, that no service was had upon them except by publication in a newspaper, and that five years had not elapsed since the entry of the decree. Notice of this motion was served on plaintiff and Laura Rine June 24, 1909, and on John A. Rine the next day. The notice was accompanied by affidavits of the applicants that they had no knowledge of the pendency of the suit until July 14, 1908, and that they had no opportunity to make a defense. With their motion the applicants filed an answer admitting their relationship to Carl Hembeck, deceased, but denying the allegations on which Laura Rine's claim of ownership of the mort-

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gages is based, and alleging that John A. Rine had entered into a fraudulent and collusive conspiracy with her and the plaintiff to avoid the payment of the mortgages. It is further alleged in the answer that plaintiff, Philip S. Rine, is the husband of defendant Laura Rine and that they are the parents of defendant John A. Rine; that the Rines, for the purpose of defrauding the applicants out of the estate to which they are entitled under the duly probated will of Carl Hembeck, deceased, entered into a fraudulent agreement and conspiracy to have John A. Rine appointed administrator and to have Philip S. Rine bring the suit at bar for the purpose of divesting the applicants of their interests in the mortgages; that the pendency of the action was concealed from applicants for the same purpose; that under the will each of the applicants is entitled to \$750 and interest, and that applicant von Gahlen is entitled to the residuary estate. There is a prayer for a dismissal of the action and for a denial of the relief demanded by defendant Laura Rine. As already stated, the hearing on the application to open the original decree resulted in a judgment denying relief to the applicants.

1. On appeal applicants argue that they complied with the statute, that the decree should have been opened, that they should have been allowed to make their defense, and that the refusal of the trial court to grant them relief was error. The first proposition argued by the Rines to sustain the action of the trial court is that applicants have no such interest in the decree of June 27, 1904, as entitles them to have it vacated. In this connection the following principle is invoked: "A party against whom a judgment or decree has been rendered, upon service by publication, must show that he has an interest in the subject of the action and that he is entitled to be heard in a defense thereto, before he can be entitled to have the decree or judgment set aside under the provisions of section 82 of the civil code." *Powell v. McDowell*, 16 Neb. 424. The doctrines relied upon to prevent a reversal are: An ex-

ecutor or administrator represents the persons to whom the personalty of decedent devolves, and in the execution of his trust his acts, in the absence of fraud or collusion, bind them. In his representative capacity he has a right to the possession and control of the personal property of the estate in course of administration, without interference from the legatees or next of kin, and during that time, in actions affecting such property, he is the proper party to prosecute or defend. 2 Woerner, American Law of Administration (2d ed.) secs. 322-324. These rules are of universal application. Cases cited in note in *Buchanan v. Buchanan*, 22 L. R. A. n. s. 454 (75 N. J. Eq. 274). The rules stated were established because they are necessary to the proper performance of the duties of executors and administrators and because they are essential to the protection and preservation of the estates of deceased persons and to the enforcement of the rights of heirs and legatees. There is, however, a recognized exception to such rules. They cannot be successfully invoked in litigation to protect a deceased person's legal representative in the betrayal of his trust, in corrupt or fraudulent conduct, in the spoilation of an estate, or in the wrongful and fraudulent refusal to prosecute or defend suits. Nor can litigants who fraudulently collude with an executor or administrator for such unlawful and dishonest purposes gain an illegal advantage or preserve the fruits of their wrongdoing by invoking the principle that such a representative alone can act in litigation for the persons to whom personalty of the decedent devolves. The exception to the general rules permits an heir or legatee to appear in a suit to protect his own rights, where there is collusion between parties asserting adverse interests and the legal representative of decedent. Cases recognizing the exception are cited in the note to which reference has been made. *Buchanan v. Buchanan*, 22 L. R. A. n. s. 454 (75 N. J. Eq. 274). In a petition alleging that two of the applicants are interested in the mortgages in controversy, plaintiff made them defendants, and by their

answer they have all brought themselves within the exception mentioned. They are clearly parties within the meaning of section 82 of the code, and as such are entitled to make a defense under the circumstances disclosed by their motion, affidavits and answer.

2. Another point urged to justify the trial court in refusing to open the judgment is that relief under section 82 of the code must be granted within five years from the rendition of the judgment. Not having presented their application to the trial court for determination until after the statutory period expired, and no relief having been granted to applicants within that time, it is argued that it was too late to open the judgment.

The statute provides: "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend; before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense." This is clearly a remedial statute within rules formerly announced by this court and should be liberally construed with a view to suppressing the mischief at which the legislation is directed and to advancing the remedy. *Buckmaster v. McElroy*, 20 Neb. 557. The code itself requires a liberal construction of the language quoted. Code, sec. 1. Construing section 82 of the code, this court in *Savage v. Aiken*, 14 Neb. 315, said: "The right to relief by a party who has not been actually before the court, nor had actual notice of the proceeding against him, is earned by his appearing and claiming it, and doing the things required of him by the statute, within the time therein limited, and the power of the court to grant the

relief continues until it is exercised." Where notice has been given and a sufficient showing made within five years, the court may grant relief afterward. *Merriam v. Gordon*, 17 Neb. 325; *Nornborg v. Larson*, 69 Minn. 344.

3. It is further contended that the affidavits were not sufficient to make it appear to the satisfaction of the trial court that during the pendency of the action applicants had no notice; that when originally filed the affidavits were not sufficiently authenticated; that on November 6, 1909, after the time for making a showing had expired, applicants asked leave to withdraw their affidavits and to amend them by adding thereto the certificate of George Eagem Eager, Consul of United States at Barmen; that such leave was granted over the objections of the Rines; and that for these reasons the refusal of the trial court to open the judgment was correct. The position thus taken is also untenable. Within five years applicants made their motion, gave proper notice and filed their answer and affidavits. The affidavit of each contained the statements required by statute. These statements remain unchanged. The objection to the affidavits is not that any material statement is wanting, but that the evidence of affiants' having sworn to the statements before a proper officer is insufficient. In this connection it is asserted that the notary's seal does not disclose the impression required by law. The record makes it clear that the trial court, notwithstanding the objections, permitted applicants to withdraw the affidavits and to amend them in the manner stated, and that after they had been amended they were received in evidence. The original affidavits as amended are not in the bill of exceptions, and the copies do not show any infirmity in regard to the seal of the notary or in any other respect. If the amendments were properly allowed, there is nothing to show that they should not be considered in support of the application to open the decree. Were the affidavits amendable? Section 1 of the code declares that "all proceedings under it shall be liberally construed with a view to promote its object

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and assist the parties in obtaining justice." Section 144 provides that "whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." In *Knox County Bank v. Doty*, 9 Ohio St. 505, it is said: "A motion to vacate a judgment for irregularity is a 'proceeding' authorized by the code, and, as such, is amendable." This rule is the same under the code of this state. When the motion of applicants was submitted to the trial court, they were entitled to relief under section 82 of the code. The refusal of the trial court to grant it cannot be justified on any ground presented on this appeal.

The judgment is therefore reversed and the cause remanded to the district court, with directions to open the original decree and to allow applicants to make their defense.

REVERSED.

M. G. SIBERT ET AL., APPELLEES, v. F. E. HOSTICK,
APPELLANT.

FILED APRIL 20, 1912. No. 16,675.

1. **Appeal: CONFLICTING EVIDENCE.** On an issue of fact submitted to a jury, their finding, unless clearly wrong, is conclusive in the appellate court, where the evidence is conflicting.
2. **Landlord and Tenant: LEASE: BREACH BY LESSOR: MEASURE OF DAMAGES.** In a suit by a lessee against the lessor for breach of contract to surrender possession of the demised premises, the measure of damages is the difference between the rental value of the leased property and the rent reserved in the lease, and in addition such special damages as are shown by the petition and the proofs to have necessarily resulted from defendant's breach of agreement.
3. **Evidence: ADMISSIONS IN PLEADING.** In proving an admission against defendant by an averment of his answer, plaintiff is only required to offer so much of the pleading as is necessary to show the admission, where the severing of the admission does not

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pervert its sense or change the meaning of other language of the pleader.

4. **Contracts: CONSTRUCTION BY PARTIES.** The interpretation which the parties to a contract put upon it may, in that respect, determine their rights under it.

APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

G. H. Bailey and H. A. Brubaker, for appellant.

H. N. Marshall and R. D. Sutherland, contra.

ROSE, J.

By written contract dated August 11, 1908, defendant leased to plaintiffs a section of land in Nuckolls county from March 1, 1909, to March 1, 1914. Plaintiffs paid \$200 down, and agreed to pay an annual rental of \$1,200, one-half on March 1st of each year and the other half on January 1st following. The second payment was to be secured March 1st each year by a note and a mortgage on the crops. Plaintiffs allege that they tendered to defendant March 1, 1909, \$400 and the stipulated note and mortgage for \$600, and at the same time demanded possession of the demised premises, which was refused. This is an action to recover damages for defendant's breach of contract. The execution of the lease and the payment of \$200 are admitted. The tender by plaintiffs, the refusal of possession by defendant, and an oral modification of the lease, permitting defendant to surrender possession a few days after March 1, 1909, are controverted issues. Upon trial to a jury plaintiffs recovered a verdict and judgment for \$2,460, and defendant has appealed.

The first assignment of error challenges the sufficiency of the evidence to sustain the verdict. Did plaintiffs make the necessary tender and demand possession? Was possession refused? Was the lease modified by parol to permit defendant to surrender possession a few days after March 1, 1909? When the contract was executed there

were two houses on the leased section, an old one occupied by defendant and her husband, but not suitable for plaintiffs, and another which had recently been built for the use of tenants. Plaintiffs demanded houses for two families, and defendant in her lease agreed to build a new house on the premises and have it ready for occupancy March 1, 1909, and she did so. Prior to that date the husband of defendant had advertised that he would sell at auction on the premises, March 9, 1909, live stock, farm machinery, grain, hay and household goods. Between 3 and 4 o'clock in the afternoon, March 1, 1909, plaintiffs, with seven or eight wagon loads of property, accompanied by their attorney, a police officer and another witness or two, arrived at the leased premises and found that defendant and her husband were occupying the new house. At the time there were horses, cattle, hogs, feed and machinery on the farm. Plaintiffs, their attorney, and a number of witnesses stopped in front of the new house. Defendant and her husband came out, and a controversy lasting an hour or more ensued. About sundown plaintiffs left with their belongings and did not return. Defendant remained in possession. Plaintiffs had paid \$200 on their lease, and had abandoned their former home. After leaving defendant's farm, they wandered from place to place in search of another. In the meantime they boarded at hotels, and herded some of their cattle. In contemplation of the lease defendant built a new house for her tenants, allowed most of the stock on her farm to be sold, rented rooms in Superior for her own occupancy, and packed most of the furniture in her old house with a view to moving it. These facts indicate that plaintiffs desired in good faith to occupy the section of land under their contract, and that defendant intended that they should do so. Under such circumstances wise counsel would ordinarily result in the performance of mutual obligations. The record is full of suggestion that litigation for breach of contract should have been avoided.

The testimony on behalf of plaintiffs tends to show that

through their attorney they tendered to defendant in front of her new house, March 1, 1909, \$400 in currency and a note and mortgage for \$600, in compliance with the terms of the lease; that they demanded exclusive possession; that the tender and the possession were refused; that defendant said complete possession at that time was impossible; that there was room for plaintiffs and defendant in the houses on the place; that the live stock and other property of both parties could be cared for temporarily on the premises; that a sale was advertised for March 9, and that defendant could not surrender exclusive possession before that time. The proofs adduced on behalf of defendant tend to show that no proper tender was made; that defendant, with a camping outfit, was temporarily occupying the new house for the purpose of completing it; that plaintiffs had informed her they did not expect to move March 1st; that they had orally agreed to allow her to remain until after the sale; that after plaintiffs started away, and while they were still on the premises, she moved her camping outfit from the new house and offered to surrender possession. The evidence relating to the parol modification of the lease was contradicted by plaintiffs, and they adduced proof that defendant subsequently admitted that possession had been refused because plaintiffs did not have money to pay the rent. The record is long and has been carefully considered, but a more extended reference to the testimony is deemed inadvisable. Though the evidence is conflicting, it is sufficient, when considered with all of the circumstances, to sustain a finding that defendant did not in good faith offer to surrender complete and unqualified possession according to her written contract, that its terms had not been changed, and that the tender by plaintiffs was sufficient. The jury having found in favor of plaintiffs on those issues, their verdict thereon, for the purposes of review, settles the facts adversely to defendant.

It is insisted that the trial court misstated the law to the jury in an instruction that the measure of damages,

in the event of a finding in favor of plaintiffs, is the difference between the rental value of the premises and the rent reserved in the lease, and in addition such special damages as are shown by the petition and the proofs to have necessarily resulted from defendant's breach of agreement. The general rule was thus correctly stated. *Herpolsheimer v. Christopher*, 76 Neb. 355, 9 L. R. A. n. s. 1127; *Shutt v. Lockner*, 77 Neb. 397; *Cannon v. Wilbur*, 30 Neb. 777. It is argued, however, that the measure of damages is different under a long-term lease, but in the last case cited the stipulated tenancy was for a period of four years.

It is further contended that the verdict is excessive as including a rental value not proved and improper items of special damages, but the allowance thereof is clearly sustained by the evidence under the rules stated. The \$200 advanced and not returned, the rental value of the section of land in excess of the rent reserved in the lease, as shown by a number of witnesses, the expenses necessarily incurred in finding and leasing other land, and in moving from defendant's farm to another, and the loss of work for plaintiffs' teams exceed the amount of the verdict, and there is competent proof of these items.

Defendant filed a duly-verified answer, alleging: "This defendant has suffered loss by reason of 240 acres of tillable land being uncultivated and not farmed for the year 1909, the rental value of which is reasonably worth to this defendant \$4 per acre, \$960," and "further damage by reason of loss of rental value on 60 acres of alfalfa hog pasture, \$360." Plaintiffs offered, and the trial court admitted, these averments in evidence, as admissions against defendant, and the ruling is assailed as erroneous under the principle that a fragment of a pleading should not be admitted in evidence, where the severing would pervert the sense of the admission or other language of the pleader. Plaintiffs were not required to offer the entire answer. So much as was sufficient to prove the admissions of defendant was all that was required. If the

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admissions were qualified or explained by other averments, defendant was free to offer them. There was nothing in the context to require plaintiffs to offer more of the answer than the admissions quoted.

It is further contended that plaintiffs were not entitled to possession until the end of March 1, under the literal terms of the lease, and that defendant had all of the next day to vacate. A recovery by plaintiffs cannot be defeated on this ground. The record shows conclusively that both parties had construed the contract, as made, to mean that plaintiffs were entitled to possession March 1. Defendant alleges in her answer that she was willing to vacate within two hours after they came upon the premises, and that "plaintiffs gave consent that defendant might remain on said premises for a few days after March 1, 1909." This was pleaded as an oral modification of the lease, and proof was adduced by defendant to establish the fact thus alleged. In her answer she also demanded the balance of the rent for the year from March 1, 1909, "to March 1, 1910." Her testimony shows that she was willing at all times to surrender at least partial possession on the earlier date. During the controversy at that time she did not assert the right to remain longer under the terms of the contract, but claimed that privilege through an oral modification. In this respect her rights will be determined according to the interpretation which all parties to the contract put upon it.

Complaint is made of rulings in giving and in refusing instructions, but the charge as a whole is fair to defendant and correctly states the law. No error being found, the judgment is

AFFIRMED.

REESE, C. J., not sitting.

**CITY OF OMAHA, APPELLEE, v. WILLIAM J. YANCEY ET AL.,
APPELLANTS.**

FILED APRIL 20, 1912. No. 16,979.

- 1. Judgment: CONCLUSIVENESS: NOTICE TO INDEMNITOR.** In an action to recover from a contractor the amount paid by a city to satisfy a judgment against it for damages resulting from his negligence and breach of contract, personal notice advising him of the original action, of the nature thereof, of the court and docket number, of his right to make a defense and of his liability for the amount of any judgment which might be rendered against the city, is sufficient to show that the amount of damages fixed by the judgment is binding on him. SEDGWICK, J., dissents.
- 2. Appeal: SUFFICIENCY OF EVIDENCE: ABSTRACT.** Where appellant relies for a reversal on the assignment that the only proof sufficient to establish a fact in issue is incompetent, he should insert such proof in his abstract with the objections, rulings and exceptions necessary to a review of that question.
- 3. Contracts: CONSTRUCTION: CONTRACT FOR CONSTRUCTION OF SIDEWALKS.** The phrases, "from the first day of January, 1902, to the 31st day of December, 1902," as used in a contract between a city and a contractor who agreed to furnish materials and construct sidewalks when ordered, *held* to refer to the ordering of sidewalks by the city, and not to the furnishing of materials and the construction of sidewalks by the contractor.
- 4. Judgment: CONCLUSIVENESS: NOTICE TO INDEMNITORS.** In an action by a city to recover over from contractors and their bondsmen the amount paid by the city to satisfy a judgment for personal injuries resulting from the contractors' negligence and breach of contract, timely notice to the bondsmen of the pending action, of an opportunity to make a defense, and of their own liability, is sufficient to show that the judgment against the city is binding on them. SEDGWICK, J., dissents.
- 5. Evidence: NOTICE BY MAIL.** In testimony that a letter containing a notice was mailed, the word "mailed" implies the payment of the necessary postage.
- 6. —: —: PRESUMPTIONS.** A letter duly addressed, stamped and posted is presumed to have reached the addressee in the usual course of mails, but such a presumption may be rebutted by proof.
- 7. —: —: —: QUESTION FOR JURY.** Testimony denying the receipt of notice inclosed in a letter properly addressed,

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stamped and mailed, does not overcome the presumption of law that the notice was received, but presents a question of fact for the jury.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

James H. Adams and Weaver & Giller, for appellants.

John A. Rine, W. C. Lambert and Clinton Brome, contra.

ROSE, J.

Contractors who had been directed to build 50 feet of sidewalk along the east side of Fifteenth street between Ohio street and Spring street in Omaha made and left unprotected an excavation in the sidewalk space at that place. Lizzie Wright fell into it and was injured. In an action against the city for damages for personal injuries caused in the manner stated, she recovered a judgment for \$5,000. The city paid the judgment and brought this suit against the contractors and their bondsmen to recover the amount so paid. From a judgment in favor of the city for the full amount of its claim defendants have appealed.

The first point urged by the contractors as a ground of reversal is that they are not bound by the judgment in the case of Wright against the city, because they had not been notified of the pendency of the action in which it was rendered. This position cannot be maintained. Two abstracts were filed, one by defendants and the other by the city. The latter states that a formal notice by the city attorney to the contractors, advising them of the action of Wright against the city, of the nature of the suit, of the court and docket number, of their right to make a defense and of their liability for the payment of any judgment which might be rendered against the city, was served personally on each of the contractors July 17, 1903. The suit against the city had been commenced June 6, 1903, and the case was tried at the October term, 1904. This

notice, if properly given, was sufficient. It is argued, however, by the contractors that the proof of notice, as stated, is incompetent, but it is not found in their abstract, nor is there anything therein to show it was erroneously admitted. While the city's abstract contains the evidence showing proof of notice, it does not show that the contractors objected to its admission or excepted to the ruling admitting it, and the bill of exceptions, under the circumstances disclosed, will not be examined for the purpose of sustaining this assignment of error.

The only other assignment argued by the contractors is that the trial court erred in holding them liable for an injury occurring subsequent to the termination of their contract. They assert that the excavation was made November 25, 1902; that their contract terminated by its own terms December 31, 1902; that the injury to the plaintiff in the suit of Lizzie Wright against the city occurred January 20, 1903; and that they were not required to protect the public from the excavation after the contract expired December 31, 1902.

By formal, written contract duly executed the contractors bound themselves: "To furnish material and construct therewith, and maintain, in a good and workmanlike manner, permanent sidewalk in the city of Omaha, according to plans and specifications on file in the office of the board of public works of said city, and as hereto appended, as may be ordered from time to time by the mayor and city council of said city, from the 1st day of January, 1902, to the 31st day of December, 1902," and "to hold the said city harmless and free from all damages that may result through the injury of any person or thing by reason of any negligence or lack of care in or about the said work or property, and to guard all dangerous points and obstructions resulting from or about the said work, by providing and maintaining proper and sufficient safeguards and day and night signals for that purpose." One paragraph of the contract is as follows: "If the contractor shall fail to construct any sidewalk that may be

ordered within sixty days after a written order to construct the same has been given, unless prevented by storms, cold weather or other equally good cause, then the city shall have the right to cause such work and all further work required by the contract to be done and charge the difference between what it would have cost under the contract and what it did cost to such contractor or his bondsmen."

Do the phrases, "from the 1st day of January, 1902, to the 31st day of December, 1902," in the connection in which they are used in the contract, refer to furnishing materials and constructing sidewalks? Do they mean that the contract terminated on the latter date, and that work commenced before the end of the year could not be completed by the contractors under the same contract in 1903? The city insists that those phrases refer to the ordering of sidewalks, and that it had a right, any time before the end of the year 1902, to order the contractors to proceed with new work, which could be completed in 1903, if necessary. The city's interpretation seems to indicate the intention of the parties, as expressed by the entire instrument. The phrases, "from the 1st day of January, 1902, to the 31st day of December, 1902," seem to limit the immediately preceding clause, "as may be ordered from time to time by the mayor and city council of said city," rather than the more remote words "to furnish material and construct therewith." There is no intimation in the contract that the city did not have the right to direct the contractors, as late as December 31, 1902, to construct a sidewalk. Had such an order been given, how could it have been obeyed in a fraction of a day? The right of performance at a later date is clearly indicated by another provision. "If the contractor shall fail to construct any sidewalk that may be ordered within sixty days after a written order to construct the same has been given," says the contract, "unless prevented by storms, cold weather or other equally good cause, then the city shall have the right to cause such work * * * to be

done" and to charge the difference in cost to the contractor. This provision indicates an intention to give the contractors ample time to complete a sidewalk after having been ordered to construct it. The contractors not only agreed to construct permanent sidewalk in good workmanlike manner according to plans and specifications on file in the office of the board of public works, but they obligated themselves to so "maintain" such walks. They were also required to furnish materials and to perform their work "to the satisfaction of the board of public works and the city engineer." If there should be an unfinished sidewalk, or if materials should be found unsatisfactory, on the last day of the year 1902, the contract, on that date, would clearly not be terminated in such a sense as to prevent the contractors from completing the sidewalk or from furnishing satisfactory materials to replace those rejected. In giving effect to every part of the instrument and to the expressed intention of the parties, it must be held that the dates fixing the beginning and the end of the period refer to the ordering of the sidewalk, and not to the construction thereof by the contractors. This interpretation permits the completion of work begun by the contractors and gives them the benefit of full performance, and relieves the city from the embarrassment of a divided responsibility for defects in materials or workmanship. These are factors which would naturally appeal to both parties in agreeing on terms. In this view of the instrument the contractors were required to protect the public from the dangers of their excavation, and this duty did not terminate at the end of the period for ordering sidewalks. For failure to do so they cannot escape liability on the ground that their contract had expired before the accident occurred. This assignment of error must therefore be overruled.

The bondsmen, F. A. Nash and D. P. Redman, are also seeking a reversal. Their interpretation of the sidewalk contract is the same as that of the contractors, Yancey and Redman. For reasons already stated they are not

entitled to relief on the ground that their liability ended before the accident occurred.

The bondsmen further argue that the judgment against them is erroneous because the city stopped the work of the contractors and prevented them from completing the sidewalk. This point is without merit for the reason that the evidence shows the work was temporarily suspended, as it should have been under the contract, on account of cold weather.

The bondsmen bound themselves as follows: "Now the condition of this obligation is such that if the said Yancey and Redman shall well and faithfully perform all the obligations under the said contract and according to the plans and specifications in the office of the board of public works of said city, then these presents shall become void, otherwise to remain in full force and effect." The bondsmen thus became liable for the damages resulting from the failure of the contractors to keep their agreement "to hold the said city harmless and free from all damages that may result through the injury of any person or thing by reason of any negligence or lack of care in or about the said work or property, and to guard all dangerous points and obstructions resulting from or about the said work, by providing and maintaining proper and sufficient safeguards and day and night signals for that purpose." As grounds of reversal of the judgment against them for the amount paid by the city to satisfy the former judgment for damages, the bondsmen now assert that they are not bound by the judgment therefor, and that the record thereof was erroneously admitted in evidence against them. The following copy of a letter dictated by the city attorney, with his signature omitted, was received in evidence:

"May 25, 1904.

"F. A. Nash and D. P. Redman, as bondsmen of Yancey and Redman under their sidewalk contract to the city of Omaha.

"Gentlemen: I desire to notify you that a new trial has

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been granted in the case of Lizzie Wright v. The City of Omaha, Doc. 83, No. 317, and that the case will soon be on trial again. If you desire to take part in the trial of said case, you will be afforded an opportunity to be represented by counsel, and make such suggestions as to the control of the case as may be proper. You are doubtless aware that the negligence complained of in this case consists of the negligence of Yancey and Redman in the construction of the walks under their contract, and in the event of recovery against the city you will be held liable as bondsmen.

“Yours very truly,

“.....

“City Attorney.”

This letter, if signed by the city attorney, and delivered to the bondsmen, gave them sufficient notice. C. C. Wright testified: He was city attorney. He remembered dictating such a letter as that quoted and signing it and leaving it to be mailed. It was addressed to the bondsmen. The letters were to be mailed to them through the regular course of the United States mail. So far as he knew this was done. It was the proper course of this work. He thought his stenographer would attend to it. The letter had not come back to his department, to his knowledge. His stenographer was called as a witness, identified the communication as a copy of a letter dictated by the city attorney to the bondsmen, and testified: She mailed the letters in connection with her regular duties. She was not sure of the date, but thought it was probably May 25, 1904. She sent the letters in the regular course of mail and they never came back, to her knowledge. They were inclosed in the regular envelope used by the legal department, with its card on them. She had in a way a personal recollection of the letter because there had been trouble about finding the address of one of the bondsmen, and it was finally obtained from the assistant city attorney. Though the copy quoted was admitted in evidence, the bondsmen contend that there was no proof of notice to

them of the former suit for the following reasons: There was no foundation for the introduction of the letter. There was no proof that postage on the letters was prepaid or that they were ever delivered. Each of the bondsmen denied on the witness stand that he had ever received the letter. They therefore insist that there is no competent proof of notice, and that the record of the judgment against the city was erroneously admitted to establish a liability against them. Is this position tenable? The city attorney testified that he dictated and signed the letters and left them in his office to be mailed. His stenographer testified that she mailed them. Without violating an act of congress the letters could not have been "mailed" without payment of postage. The meaning of her testimony is that the postage was paid.

In *National Butchers' & Drovers' Bank v. De Groot*, 43 N. Y. Super. Ct. 341, the court said: "A question was raised on the argument, as to the meaning of the term 'mailed.' The word is usually employed to designate the placing of letters or parcels in a post office, to be delivered under the public authority. The delivery of this class of mail matter is prohibited unless the postage thereon is prepaid. 2 U. S. Comp. St., secs. 3896, 3900. When the word 'mailed' appears as a note or memorandum in the official register of a deceased notary, it is consistent with reason and the actual meaning of the term to presume that it describes what that act in its common and ordinary performance calls for."

In *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, it was held: "The word 'mailed' as applied to notice of protest implies that the requisite postage was prepaid on the letter."

From the testimony in the present case the trial court was warranted in concluding that the letters, bearing sufficient postage, were committed to the United States mails. The rule is that a letter duly addressed, stamped, and posted is presumed to have reached the addressee in the usual course of mails. *National Masonic Accident*

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Ass'n v. Burr, 44 Neb. 256. The presumption, however, is rebuttable, but a well-established principle applied in *Miller v. Wehrman*, 81 Neb. 388, was stated in an earlier case as follows: "Testimony positively denying the receipt of a written demand shown to have been properly mailed, stamped, and addressed does not overcome the presumption of law that it was received, but presents a question of fact for the jury." *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437.

According to this rule it was for the trial court, acting by consent of the parties instead of a jury, to find from all the evidence whether the letters were delivered. In addition the city attorney testified that he told the bondsman Nash he ought to see the contractors and have the case tried and settled. The testimony is sufficient to sustain a finding that the bondsmen had sufficient notice of the original suit. They are bound by the amount of damages fixed by the former judgment.

AFFIRMED.

SEDGWICK and LETTON, JJ., concur in the conclusion.

FIRST NATIONAL BANK OF TRENTON, APPELLANT, v. LINK
L. BURNEY ET AL., APPELLEES.

FILED APRIL 20, 1912. No. 16,569.

1. **Evidence:** PAROL EVIDENCE: NOTES. "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." *Davis v. Sterns*, 85 Neb. 121.
2. **Contracts:** WRITTEN CONTRACT: CONTEMPORANEOUS PAROL AGREEMENT. "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a

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distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." *Norman v. Waite*, 30 Neb. 302.

3. Evidence examined, and held sufficient to sustain the verdict.

OPINION on motion for rehearing of case reported in 90 Neb. 432. *Former judgment vacated, and judgment of district court affirmed.*

FAWCETT, J.

This case was argued and submitted upon a motion for rehearing, our former opinion being reported in 90 Neb. 432. The issues will be found clearly stated in the opinion there reported. It will be observed that the controversy here is between the plaintiff bank and defendant Britton, who was surety upon the note in suit.

The case turns upon the proposition as to whether or not defendant Britton could rely upon the contemporaneous oral agreement set up in his answer, and the performance of the terms and conditions of that agreement, as a defense to the note. The evidence offered by defendants shows that the oral agreement, so far as defendant Britton was concerned, was contemporaneous with the execution by him of the note in suit. The evidence as to the making of the oral agreement and as to what was said and done by the officers of the bank and Burney, after the returns upon the *Clarinda* shipment had been received, is conflicting. Upon one point, however, there is no conflict, viz., that the draft for the entire proceeds of the shipment was received by the bank. The evidence as to the making of the oral agreement, and of its subsequent performance, being conflicting, that issue was submitted to the jury. The finding of the jury was in favor of defendant Britton. If, therefore, the evidence was properly received, the verdict of the jury must stand. This leaves nothing but the question of law to be considered by us.

Jones, *Evidence* (2d ed.) sec. 495 (507) says: "The exceptions to the general rule which excludes parol evi-

dence to explain written instruments apply in respect to negotiable paper, as well as to other contracts. We have seen in a former section that wide range is given to the proof when the issue of *fraud* is raised. On the same principle, *illegality*, *alteration* and *want of consideration* may be shown. As between the original parties, the *conditional delivery* of a note may be shown, as that it was delivered in escrow. So it may be shown, as between the original parties, that the note had been *discharged* by the performance of an oral agreement, or that the delivery was conditioned upon a certain event. * * * It is also admissible to show by parol the capacity and true *relations of the parties*, such as that a signer of a note is a surety, and that this was known to the plaintiff. * * * Nor is it any violation of the rule to show by extrinsic evidence an entirely distinct and *collateral contract*, or to show whether the instrument was given in satisfaction of a former note, or as security therefor; or that the note has been *discharged* by the performance of an agreement."

In *Walters v. Walters*, 34 N. Car. 28, it is held: "Where A gave B a bond for fifty dollars, and, at the same time, it was agreed by parol, that, whenever A paid certain costs in a suit then pending between the parties, the bond should be surrendered and given up, and A afterwards paid the costs; *held*, that this was competent and sufficient evidence of the discharge of the bond."

In *Howard v. Stratton*, 64 Cal. 487, it is held: "In an action upon a promissory note, parol evidence is admissible to show that it was given to secure the performance of an agreement whereby the payee conveyed certain lands to the maker in consideration that the latter should support him during the residue of his life, and that the defendant had performed the conditions of the agreement."

In *Maltz v. Fletcher*, 52 Mich. 484, in an opinion by the eminent Chief Justice Cooley, it is said: "It is always competent to show that a contract sued upon is without consideration. And no rule or policy of the law is violated by allowing proof to be made of the purpose for

which negotiable paper was given or that the purpose does not require that payment should be enforced."

In *Clark v. Ducheneau*, 26 Utah, 97, it is held: "Where, in an action on a note, defendant admitted its execution, parol evidence that it was not given for a loan, as plaintiff contended, but to secure performance of defendant's verbal agreement to purchase certain mining stock for plaintiff, and was to be surrendered on delivery of such stock, and that defendant had fully performed such agreement, was not objectionable as tending to vary or contradict the terms of the note."

In *Oakland Cemetery Ass'n v. Lakins*, 126 Ia. 121, it is held: "Where a note was executed in consideration of other prior agreements between the parties, parol evidence is admissible in an action on the note, to show the entire agreement and that it has been performed." In the opinion by Deemer, C. J., it is said: "The general rule of inadmissibility of parol evidence to contradict, change, or vary the terms of a written instrument, and the reasons underlying the same, are well understood; but there are certain exceptions to that rule, which are not so familiar to the profession, nor so well settled. There seem, however, to be two well-recognized exceptions which are applicable to this case. One is, parol evidence is admissible to show that delivery was subject to a condition that upon a certain contingency or event the contract should not be binding, and the other, such evidence is admissible to show that a note has been discharged by the performance of an undertaking which it was given to secure. Thus it may be shown that what purports to be a written obligation has been discharged in accordance with the terms of a collateral parol agreement."

In the opinion *Gifford v. Fox*, 2 Neb. (Unof.) 30, written by our Mr. Commissioner DAY, is cited as supporting Judge Deemer's conclusions. The syllabus in *Gifford v. Fox* reads: "(1) While parol testimony may not be received to vary or contradict the terms of a promissory note, yet the considerations for which it was given may be

established by parol testimony. (2) Parol testimony is admissible in an action upon a promissory note to show that it was given to secure the performance of an agreement whereby the payee conveyed to the maker certain lands in consideration that the maker should support the payee during his lifetime, and that the maker had performed the conditions of the agreement." In *Walker v. Haggerty*, 30 Neb. 120, the first paragraph of the syllabus reads: "While parol testimony may not be received to contradict or vary the terms of a promissory note, yet the consideration for which it was given may be established by parol testimony." In *Norman v. Waite*, 30 Neb. 302, it is held: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend."

In *Barnett v. Pratt*, 37 Neb. 349, Mr. Commissioner IRVINE said: "Further, it is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument. Among the cases establishing this principle are: *Chapin v. Dobson*, 78 N. Y. 74; *Ferguson v. Rafferty*, 128 Pa. St. 337. The same doctrine substantially has been adopted by this court. *Norman v. Waite*, 30 Neb. 302. It will be observed that the allegations of the petition and the evidence offered brought the case strictly within this rule."

Finally, we have *Davis v. Sterns*, 85 Neb. 121, which would seem to be decisive of this case. In the first para-

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graph of the syllabus it is held: "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." The opinion on page 127 cites *Walker v. Haggerty*, *Norman v. Waite* and *Gifford v. Fox*, *supra*, and quotes with approval from the last named case. The writer has examined numerous other cases from various courts, all to the same effect as those above quoted from.

After a careful reconsideration of the questions involved and the law applicable thereto, we conclude that this case is controlled by the rule announced in *Davis v. Sterns* and *Norman v. Waite*, *supra*, as shown by the quotations from those two cases above given. It follows that the evidence as to the oral agreement and its performance was properly received.

Our former judgment is therefore vacated, and the judgment of the district court is

AFFIRMED.

BARNES, J., dissenting.

For the reasons given in our former decision of this case, I cannot concur in the foregoing opinion.

**EDWARD B. COWLES, APPELLANT, V. ANNIE E. KYD,
APPELLEE.**

FILED APRIL 20, 1912. No. 16,664.

1. **Judgment:** RES JUDICATA: TAX LIEN. A right obtained under a tax sale certificate, like any other civil right, may be barred by the decree of a court of competent jurisdiction in a suit where the owner of such certificate is duly made a party, and his claim to priority under such certificate is assailed in the pleadings and adjudicated against him by the court.
2. ———: ———. One duly served with summons thereby becomes a party to the suit or action, and, unless subsequently dismissed,

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remains such throughout the proceedings. As such party he is presumptively present in court during the trial and at the entry of judgment. He is charged with notice of every claim adverse to him contained in the plaintiff's petition.

3. ———: ———. And, in such a case, if the petition alleges that he has or claims a lien or some interest in the land involved in the suit, but that his lien or claim is junior and inferior to that asserted by the plaintiff, and he stands mute and permits the entry of findings and judgment against him and in favor of the plaintiff upon that contention, and an innocent third party purchases the land at sheriff's sale under the judgment so entered, the judgment is *res. adjudicata* as between such party and the plaintiff, and as between him and the purchaser at such sale.
4. ———: ———: TAX LIEN. And the fact that, at the time he is required to answer in such suit, he is the holder of a tax sale certificate, issued to him less than two years prior thereto, will not excuse him from failing or refusing to set up his lien under the certificate so held by him. Failing so to do, his right to subsequently assert it against the judgment entered in such suit, or against those claiming as purchasers under said judgment, is forever barred and foreclosed.
5. ———: ———. Where the district court has jurisdiction of the subject matter and of the parties, its determination of all disputed questions in the suit is binding upon all the parties thereto. If the court errs, the remedy is by appeal, and not by subsequent collateral attack.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

C. H. Denney, for appellant.

Samuel Rinaker and *A. H. Kidd*, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Gage county to foreclose a tax sale certificate on lot 3, block 22, in Cropsey's addition to the city of Beatrice. The petition is in the usual form. Defendant filed an answer and cross-petition, pleading a former adjudication and praying that the title of defendant be quieted. Defendant prevailed in the court below, and plaintiff appeals.

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The record shows that on November 4, 1897, one Sibbernson purchased the lot in controversy for the delinquent taxes for the year 1896, and received a certificate of purchase therefor; that he subsequently paid the taxes for the years 1897 and 1898. On September 16, 1904, Sibbernson filed a petition to foreclose his tax lien. In his petition he made Mr. Cowles, plaintiff in this suit, a defendant, and summons was duly served upon him. The answer day fixed in the summons was October 17, 1904. On November 5, 1902, Mr. Cowles had purchased the lot at tax sale for the delinquent taxes of 1901, and received a certificate therefor. He subsequently paid the taxes for the years 1902 and 1903. At the time he was required to answer in the Sibbernson suit, two years had not elapsed, by 19 days, from the date of his certificate, and he now contends, first, that he was neither a necessary nor proper party in the Sibbernson suit, and therefore could not be affected by any decree rendered therein; second, "the court did not have jurisdiction of the subject matter in said foreclosure proceedings and therefore the proceedings were void," and, third, "a valid tax lien can only be barred by payment or the statute of limitations." The petition in the Sibbernson suit alleged that "the defendant E. B. Cowles (and other defendants not necessary to name here) each have, or claim to have, some lien or interest in and to the said premises, but the exact nature and extent of which the plaintiff does not know, but plaintiff says that whatever lien, title, or interest the defendants, or any of them, may have in said premises is subsequent, junior and inferior to plaintiff's lien for the taxes purchased and paid as aforesaid." It is admitted by plaintiff here that he was duly served with summons in the Sibbernson case; that he never entered his appearance therein but deliberately made default. The decree entered in that case found that Mr. Cowles had been duly served, and default was entered against him. It found that the allegations in plaintiff's petition were true; that he was the owner and holder of the various tax sale certificates

set forth; found the amount due to the plaintiff Sibbern-
sen and adjudged that the amount so found due was a
first lien on the premises in controversy; found further
that "whatever interest in, or lien upon, the said real
estate the defendant may have is junior, inferior and sub-
sequent to the lien of the plaintiff's tax sale certificates;"
adjudged that if the defendants failed for 20 days from
the date of the decree to pay the sums found due plaintiff
they be foreclosed and forever barred; that an order of
sale issue to the sheriff to sell the property as upon execu-
tion, etc. The sale was duly advertised, made, and the
sale confirmed and deed ordered to be made to Annie E.
Kyd, the defendant in this suit, which deed was issued
August 12, 1907. Under this deed she took and still
holds possession. The record shows that the sum realized
from the sale of the property in the Sibbern-
sen suit was sufficient to pay the liens established and costs of the suit,
and leave a surplus of \$562. The question to be deter-
mined here is, do the proceedings in that suit establish
the defense of *res adjudicata* in this? The trial court so
found, and we so find.

We do not agree with the contention of plaintiff that a
valid tax lien can only be barred by payment or the stat-
ute of limitations. General expressions of that kind may
be found in reported cases, but in every instance it will be
found that those general statements apply to the facts of
the case in which the language is used. A right obtained
under a tax sale certificate, like any other civil right, may
be barred by the decree of a court of competent jurisdic-
tion in a suit where the owner of such certificate is duly
made a party, and his claim to priority under that lien is
assailed in the pleadings and adjudicated against him by
the court. One duly served with summons thereby be-
comes a party to the suit or action, and, unless subse-
quently dismissed, remains such throughout the proceed-
ings. As such party he is presumptively present in court
during the trial and at the entry of judgment. He is
charged with notice of every claim adverse to him con-

tained in the plaintiff's petition. If it is therein alleged that he has or claims a lien or some interest in the land involved in the suit, but that his lien or claim is junior and inferior to that asserted by the plaintiff, and he stands mute and permits the entry of findings and judgment against him and in favor of the plaintiff upon that contention, and an innocent third party purchases the land at sheriff's sale under the judgment so entered, that judgment is *res adjudicata* as between such party and the plaintiff, and as between him and the purchaser at such sale. If, in such a case, the party so served, at the time of such service and at the time when he is notified to answer, is the holder of a tax sale certificate, issued to him less than two years prior to the answer day, the fact that he cannot then demand a foreclosure of his lien will not excuse him from failing or refusing to set up his lien under the certificate held by him. Failing so to do, his right to subsequently assert it against the judgment entered in that suit, or against those claiming as purchasers under said judgment, is forever barred and foreclosed. *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735; *Barton v. Anderson*, 104 Ind. 578.

In so holding, we have not overlooked *Western Land Co. v. Buckley*, 3 Neb. (Unof.) 776, and *Gibson v. Serson*, 82 Neb. 475. *Western Land Co. v. Buckley* is an unofficial commissioner's opinion and has no standing as an authority in the sense in which the doctrine of *stare decisis* is applied. *Flint v. Chaloupka*, 72 Neb. 34. But, even if it were to be considered as an authority generally, it could not be treated as such in this case. In that case the amount due upon the tax lien was deducted by the sheriff at the time of the sale of the property under the mortgage foreclosure suit in which the holder of the lien failed to appear; hence, the purchaser at the mortgage foreclosure sale took subject to the rights of the holder of the tax lien. Again, in that case it was said: "Upon the question whether or not the holder of a tax lien prior in point of time to the date of a mortgage being

foreclosed is a necessary or proper party, we express no opinion." Therefore, that question was not decided. The subsequent language of the writer of that opinion, to the effect that, because less than two years had elapsed from the date of the certificate of tax sale, the court would be without authority to enter a decree foreclosing the lien until after the expiration of the two years, and therefore the holder of the tax lien, "while likely a proper party, was, at all events, not a necessary party to the mortgage foreclosure proceedings," is *obiter dictum* pure and simple. It is clear that the proceedings in the foreclosure suit did not cut off or in any manner bar the lien or right of action thereunder of the Western Land Company, the holder of the tax lien, because the appraisement and sale reserved and left those rights unimpaired. The writer of the opinion cites and relies upon *Lincoln Nat. Bank v. Virgin*, *supra*, but it is evident from a careful examination of that opinion, that he misapprehended its scope. The writer of this opinion fell into the same error when he wrote the opinion in *Gibson v. Sexson*, *supra*, and indulged in discussion and included in the syllabus a holding upon a point not necessary in the decision of that case. *Lincoln Nat. Bank v. Virgin* does not support *Western Land Co. v. Buckley*, nor *Gibson v. Sexson*; but is in harmony with the rule we have above announced.

In *Lincoln Nat. Bank v. Virgin* it is said: "There is no doubt of the jurisdiction of a court of equity, upon proper pleadings in a foreclosure proceeding, to determine the rights of all parties thereto with respect to the subject of the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. * * * The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint.

1 Herman, Estoppel, sec. 53. A recognized exception, however, is that where, in a foreclosure or other kindred proceeding, a defendant who is called upon to disclose his supposed but unknown interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to that of the plaintiff. *Barton v. Anderson*, 104 Ind. 578. The Merchants Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive."

The reasoning of Post, J., in that case applies here. In the Sibbernson suit the plaintiff asserted the priority of his lien over any claim or lien of defendant Cowles, who had been personally served with summons. There is no doubt of the jurisdiction of the court to determine in that suit the rights of those two parties with respect to the subject of the controversy, viz., the priority of their liens. The petition called upon defendant to disclose his interest or claim. The defendant saw fit to decline to do so and therein made default. He must, therefore, "be held thereby to have admitted that his interest therein is (was) subordinate to that of the plaintiff," and "must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree (therein entered) is conclusive." The only right then remaining to defendant Cowles in that suit was to have had his claim satisfied out of the surplus arising from the sale. The surplus was ample to have satisfied his claim. He could not refuse to obtain satisfaction from that and thereafter seek satisfaction out of the land which passed to the purchaser by the sale under that decree. Any other rule than this would permit parties duly served with summons in a court of general jurisdiction, in a case involving subject matter of which the court has full and complete jurisdiction, to determine for himself the question as to whether he is a proper party, and the further question as to whether disputed priorities of himself and the plaintiff can be adjudicated by the court in that case. Where the court

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has jurisdiction of the subject matter and of the parties, its determination of all disputed questions in the suit are binding upon all parties thereto. If the court errs, the remedy is by appeal, and not by subsequent collateral attack. The justice of this rule is well exemplified in the present case. The decree in the Sibbernson case was entered March 23, 1906; sale made thereunder July 15, 1907; sale confirmed July 16, 1907; deed issued August 12, 1907; present suit commenced November 12, 1907. The parties to that suit were Sibbernson, plaintiff; Cowles, defendant. The parties to this suit are Cowles, plaintiff; Annie E. Kyd, purchaser under the Sibbernson judgment, defendant. Everything claimed by plaintiff here could have been decided there. Every right demanded here could have been obtained there. He not only could have been protected by the decree in that case, but the funds realized from the sale were sufficient to pay all claims, including his. We think the district court was warranted in finding that plaintiff's claim, as against the defendant, was barred and foreclosed, and that "there is no equity in the claim and action of the plaintiff."

The judgment of the district court was right, and it is

AFFIRMED.

REESE, C. J., not sitting.

JOE MCKAY V. STATE OF NEBRASKA.

FILED APRIL 20, 1912. No. 16,975.

- 1. Information: SUFFICIENCY.** An information is defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date.
- 2. Criminal Law: INFORMATION: AMENDMENT: TRIAL.** And in such a case it is error for the trial court, after permitting an amendment curing such defect, to require the accused, over his objection, to immediately proceed with the trial without arraignment

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under and plea to such amended information and without giving him the statutory time of 24 hours in which to plead thereto.

3. ———: **FORMER JEOPARDY.** Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, *held*, that the accused is not thereby placed in jeopardy a second time.
4. **Former Opinion Modified.** Our former opinion examined, modified as set out in the following opinion, and in all other respects adhered to.

OPINION on motion for rehearing of case reported in 90 Neb. 63. *Rehearing denied. Former opinion modified.*

FAWCETT, J.

When our opinion was handed down in this case (90 Neb. 63) the county attorney of Antelope county requested, and the attorney general directed, a mandate to go down. Subsequently, and within 40 days from the filing of the opinion, the private prosecutor employed by the relatives of the deceased requested and was given leave to file a motion for a recall of the mandate and for a rehearing of the case. Upon the filing of the motion argument thereon was ordered and has been had. The case is now before us on that motion, for review.

Counsel for defendant has entered objections to a further consideration of the case in this court for various reasons which we deem it unnecessary to set out. It is sufficient to say that we permitted the filing of the motion for rehearing and must now decline to dispose of it without consideration. Defendant's objections are therefore overruled.

Upon the original hearing we held the information originally filed to be void. This holding is now assailed. The writer is satisfied with our former holding and is still of the opinion that the information was void. A majority of the court, however, are of opinion that this is stating the matter too strongly; that the information was defective merely, but not void. Paragraphs 1, 2 and 3 of the

syllabus of the former opinion are, therefore, hereby modified so as to read as follows:

1. An information is defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date.

2. And in such a case it is error for the trial court, after permitting an amendment curing such defect, to require the accused, over his objection, to immediately proceed with the trial without arraignment under and plea to such amended information and without giving him the statutory time of 24 hours in which to plead thereto.

3. Where one accused of a felony is put upon trial under an information defective upon its face, and, after trial begun, the information is amended and the trial proceeded with, there being no change in the offense charged, *held*, that the accused is not thereby placed in jeopardy a second time.

That portion of the opinion upon which the above three paragraphs of the syllabus are predicated is also modified so as to conform therewith.

Our opinion in relation to the employment of private counsel, as embodied in paragraphs 4, 5 and 6 of the syllabus, is next assailed. We deem it unnecessary to again discuss that question. We are satisfied with our former opinion upon that point and adhere thereto. This case presents a good illustration of the sufficiency of the reasons which prompted the legislature to amend the statute in relation to the employment of private counsel in felony cases, and of the soundness of our former holding. Here we have private counsel, employed by relatives of the deceased, not only dominating the trial of a felony case in the court below, but obtruding himself into this court, after the attorney general and the county attorney had accepted the opinion and obtained the issuance of a mandate, and attempting to further serve his private clients by a persistent contention at variance with the orderly course then being pursued by the able prosecuting officers of the state.

Our opinion as reflected in paragraph 7 of the syllabus is next assailed. An attempt is made to justify the offering in evidence of the blood-stained garments of the deceased upon the theory that the evidence shows that the defendant was seen leaving the house of the deceased early in the morning of the day when the body was discovered, and that this evidence would show that the deceased was murdered after arising in the morning. It had already been shown by the testimony of the persons who first found the body of the deceased that, at the time they made the discovery, the body was lying at the foot of the cellar stairs, fully dressed, with the bloody ax, with which the deed had evidently been committed, lying beside it. This undisputed testimony established the fact that at the time of the murder the deceased was fully dressed; but neither that testimony nor the blood-stained garments themselves would prove that he had been murdered after arising in the morning, any more than they would prove that he had been murdered before the time for retiring the evening before. No attempt to disguise the motive of counsel in offering these blood-stained garments in evidence can obscure the fact that the real motive was for the purpose of exciting the passions of the jury. We are satisfied with our former holding and adhere thereto.

The motion for rehearing is therefore overruled, and our former opinion, modified as above set out, is adhered to.

FORMER OPINION MODIFIED.

REESE, C. J., not having heard the arguments upon the motion, took no part.

ROSE, J., dissenting.

Upon further reflection, I do not think the conviction should be set aside for any reason assigned in the former opinion or in the modification thereof on the motion for a rehearing.

1. Though the information was filed in the district

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court April 28, 1910, and the homicide occurred December 7, 1909, the date of the murder, as stated in the charge, was December 7, 1910. Why should the future date, which was palpably erroneous, control the charge that the felonious act had been committed in the past, where time is no part of the crime and the prosecution never outlaws? The information shows on its face that it was verified by the oath of the county attorney April 28, 1910, and that it was filed in the district court the same day. It is also formally and fully charged in technical language that defendant did feloniously make the fatal assault in Antelope county, and did strike and wound his victim, and that in consequence the victim "then and there did die." The verbs are in the past tense. They contradict the immaterial future date. The figures "1910," which constitute no part of the felony, are repugnant to the material charges in the past tense. The nonessential future date should yield to the fundamental charges that the unlawful acts were committed in the past. In these respects the legislature in adopting the criminal code of this state departed from the technical exactitude formerly required by the rules of the common law. "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected," declares the criminal code, "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly"; nor "for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Criminal code, sec. 412. The criminal code further provides that a variance between the statements of the information and the evidence offered in proof thereof shall not be deemed "ground for an acquittal of the defendant, unless the court before

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which the trial shall be had shall find that such variance is material to the merits of the case or may be prejudicial to the defendant." Criminal code, sec. 413.

Construing these provisions of the criminal code, this court held: "Under section 412 of the criminal code, an indictment or information is not rendered fatally defective 'for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly.' " *Rema v. State*, 52 Neb. 375. This rule applies to the present case, because time was not of the essence of the offense, and the date was imperfectly stated. Within the meaning of the criminal code the erroneous figures "1910" are repugnant to the formal charge that the felony had been committed by defendant before the county attorney filed his information. Besides, the omission to give the date correctly did not prejudice defendant. The county in which the murder was committed was named. The name of the murdered man was stated. The weapon used was described. In the complaint filed before the justice of the peace the date was correctly stated. Under this complaint he was arrested and bound over to the district court to answer the identical charge, giving the correct date. He had time to prepare for trial under the original information filed in the district court, and was represented by eminent counsel. Every fact necessary to a flawless information was as fully imparted to him by the judicial record of the proceeding, as would have been disclosed, had the date been correctly stated. That the information, before the year "1910" was changed to 1909, was sufficient to support a conviction seems to be sustained by the weight of authority, where the rules of the common law have been modified by statute, as in this state.

The report of *Conrand v. State*, 65 Ark. 559, shows that the indictment was filed July 14, 1896, and that it gave the date of the felony as May 15, 1899. In passing on the sufficiency of the indictment under statutes which modify the rules of the common law, the court in that case said:

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"In the indictment before us the grand jury of Faulkner county accused the defendant of the crime of slander, 'committed as follows,' and alleged that the defendant, 'on the 15th day of May, 1899, then and there maliciously, wilfully, feloniously, and falsely *did* use, utter and publish,' etc. They alleged that the offense was committed in the past, using the words 'committed' and 'did' for that purpose, on a day some time in the future. No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of having committed a crime before it was committed. To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant, and did not affect the validity or sufficiency of the indictment or the judgment against him"—citing *Williams v. Commonwealth*, 18 S. W. (Ky.) 1024.

In *Stevenson v. State*, 5 Bax. (Tenn.) 681, defendant was indicted for burglary February 5, 1876, the date of the crime as stated in the indictment being February 22, 1876. In passing on the sufficiency of the indictment under statutes changing the common law, the supreme court of Tennessee said: "The indictment was found 5th of February, 1876, and charges that the offense was committed 'heretofore, to wit, the 22d of February, 1876.' The code only requires that the offense be charged to have been committed previous to the finding of the indictment, no particular day being necessary to be alleged or proved where time is not an ingredient in the offense. Code, sec. 5124. It is true it has been held that it must be distinctly alleged and not left to inference or construction (*King v. State*, 3 Heisk. (Tenn.) 148), but the language here is heretofore, to wit: This certainly means before the finding of the indictment. It is true 22d of December (February) 1876, is repugnant and an impossible date, in reality a mere mistake of the draftsman, and may

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be rejected, but we think the indictment good after verdict."

In *State v. Brooks*, 85 Ia. 366, the indictment was returned February 13, 1890, and charged that the offense was committed November 15, 1890, whereas the latter date should have been November 15, 1888. The prosecution was allowed to correct the mistake, and the supreme court observed: "It is not only apparent that the date '1890' was an impossible date and a clerical error, but that, omitting that date, still the offense is charged to have been committed at a time possible and certain, namely, 'on or about the fifteenth day of November, 1888.' Code, section 4538, requires that we 'must examine the record, and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. A mere clerical error, which can be discovered by a casual reading of the indictment itself will not render it fatally defective.' *State v. Crawford*, 66 Ia. 318; *State v. Gurlock*, 14 Ia. 444; *State v. Emeigh*, 18 Ia. 122; *State v. White*, 32 Ia. 17. This being a mere clerical error, apparent upon the face of the indictment, the defendant was not prejudiced by allowing the correction."

In *State v. McDaniel*, 94 Mo. 301, the court enforced a statute providing that no indictment shall be deemed invalid for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened. The rule was stated thus: "An indictment for murder which charges the assault and wounding to have occurred on the twenty-fifth day of December, 1886, from the effects of which the deceased died on the twenty-fifth day of December, 1885, is not fatally defective. The mistake is merely clerical, is cured by the statute (R. S. 1879, sec. 1821), and should be disregarded."

In *Conner v. State*, 25 Ga. 515, the presentment was dated September term, 1857, and charged that the offense was committed December 15, 1857, and the court said:

"Have not all the courts, both in England and in this country, settled it so long ago, that the memory of man runneth not to the contrary, that while some day must be stated, any other may be proven? Who does not see, that if it be immaterial to prove the day as charged, that no day or an impossible day will do just as well? But it will be replied, that it never was decided, but that the time charged must be before the accusation is preferred. And I concede this to be so, at least for the purposes of the argument. But let us look at the reason of the thing. Suppose the day be laid subsequent to the finding of the grand jury; it is the same in effect as stating an impossible day, as the fortieth of May, and if it be correct that any day within the statute of limitations and before indictment found will suffice, it is quite clear that no day, or one that is impossible, will do just as well."

In *State v. Pierre*, 39 La. Ann. 915, it was decided: "An immaterial and impossible date in an indictment may be corrected at any time; particularly when the date is not of the essence of the offense charged."

In modifying the rules of the common law on this subject the criminal code of Nebraska goes further than that of most of the states in which the decisions cited were rendered. To give effect to the changes which the legislature of this state made in the rules of the common law, it seems to me to be necessary to hold that the information as originally filed in the district court in the present case was sufficient to support a conviction without amendment or correction. If I am correct in this conclusion, it follows that the amendment inserting in the information "1909" instead of 1910 was immaterial, and that there was no error in refusing a postponement because of the change.

2. As I view the law, the majority opinion places too many restrictions around the engaging of private counsel to assist in criminal prosecutions. The proper solution of this question must rest upon the construction of the statute relating to the powers and duties of county at-

torneys. In 1885 the legislature passed an act containing the following provisions:

"It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested. * * *

"The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; provided, that the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such reasonable compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried, certifying to the services rendered by such assistant or assistants." Laws 1885, ch, 40, secs. 2, 6; Comp. St. 1885, ch. 7, secs. 16, 20.

It is matter of common knowledge that the officers of the executive department of the state government, in the enforcement of the criminal laws, have construed the foregoing statutory provisions to allow the county attorney such assistance as he believes to be necessary, if obtained by him with the consent of the court and without expense to the county; and such assistance, if allowed by the judge of the district court without objection from the county attorney, has not been regarded as a violation of the statute. This construction is not unreasonable. It does not deprive accused of any right. The statutory provisions quoted show that the county attorney has ample control of criminal prosecutions. As the representative of the state he may exclude at any time an assistant who abuses his privileges or otherwise misbehaves. The trial

court has authority to protect the defendant from all improper acts of any attorney representing the state. It ought to be assumed that a judge of the district court, in presiding in his own tribunal, will be anxious about proper decorum and the due administration of justice. It should not be presumed that a trial judge will fail to observe and repress improper conduct of counsel for the state, whether it grows out of excessive zeal, malice, hope of reward, or professional vanity. The construction which gives sanction to the rulings of the trial court in this case has been followed by the prosecuting officers of the executive department of the state government with the approval of the district courts since the statute was passed in 1885. While the sections containing the provisions under consideration have been amended from time to time, the provisions themselves, construed and applied as already stated, have remained unchanged during all these years. The question should therefore be determined according to a doctrine recently stated in the following language: "When a statute has for nearly 40 years been practically construed by the officers whose duty it is to enforce it, and has during that time been several times re-enacted by the legislature in substantially the same terms, such construction will be regarded as adopted by the legislature, although the language of the statute would indicate a different meaning." *State v. Sheldon*, 79 Neb. 455.

For these reasons, I am constrained to recede from the construction adopted in the former opinion.

3. I am unwilling to say that the garments worn by the victim of the homicide at the time of his death were incompetent for every purpose in proving the state's case. In my judgment the record does not establish the correctness of that proposition. "If the evidence offered be legally admissible for any purpose, an objection to such evidence should be overruled." *Carleton v. State*, 43 Neb. 373. Competent evidence bearing on an issue cannot be excluded from the jury because it may incidentally arouse

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their prejudices. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559. If this were not the law, the shocking atrocity of the homicide in this case would prevent a conviction. I think the majority opinion attaches too much importance to the rulings admitting the garments in evidence, when more revolting proofs of the crime are considered. Unless an assignment of error not discussed is meritorious, the judgment, in my opinion, should be affirmed.

LETTON, J., concurs in dissent.

WESLEY H. MADDOX, APPELLANT, v. W. A. HARDING,
APPELLEE.

FILED APRIL 20, 1912. No. 17,046.

1. **Brokers: SALE OF LAND: RIGHT TO COMMISSION.** Where the owner of real estate contracts with an agent for its sale, and no limit of time is fixed by the parties, the agent's authority may be revoked at any time; but, if, at the time of the revocation, the agent had negotiations for a sale pending, with a party whom he had introduced to the owner, and the owner had himself participated in such negotiations, and afterward the negotiations are continued or within a few days renewed and consummated by the owner, in person or through another, the agent is entitled to his commission.
2. ———: ———: ———. And if during such negotiations the agent of the seller is also the agent of the proposed buyer for the sale of other real estate owned by him, which it is proposed shall be accepted by the seller as part payment, and both seller and buyer know of such dual agency, and with such knowledge continue to negotiate with each other through such agent, and a deal is finally consummated, the fact of such dual agency cannot be interposed by either as a defense in an action by such agent for his stipulated compensation.
3. **Evidence** examined, and referred to in the opinion, *held* sufficient to require a submission to the jury.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Reversed.*

James E. Leyda, for appellant.

Reavis & Reavis and *H. N. Mattley*, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Richardson county, to recover commission upon the sale of a farm. At the conclusion of the trial the court directed a verdict in favor of the defendant, upon which judgment was rendered, and plaintiff appeals.

The petition alleges that on September 19, 1908, plaintiff entered into a written contract with defendant to act as agent of defendant in the sale of certain land in Richardson county. A copy of the contract is attached to the petition. The contract described the land and the amount which defendant was to pay as commission in the event that plaintiff furnished a buyer or was instrumental in any manner in selling or transferring the property. The petition further alleges that the terms of the contract were afterwards modified by a letter, making the selling price of the land \$17,000; that later, at the office of plaintiff, on or about December 31, 1908, by mutual agreement between defendant and one Poteet, the defendant and Poteet agreed upon terms of the sale, whereby defendant was to receive \$14,500 in cash and notes, and a piece of town property of the valuation of \$5,500; that, acting under said contract, at the suggestions and directions of defendant, plaintiff procured the purchaser, but defendant refused to convey, and attempted to withdraw the land from the market; that a few days thereafter defendant himself sold and conveyed the land in question to the said Poteet; that plaintiff first introduced Poteet to defendant; that plaintiff was instrumental in bringing about the sale and transfer of defendant's farm, and is entitled to his commission; that defendant's sale of the farm to Poteet was for the sum of \$20,000. The answer admits the execution of the contract, the withdrawal of the

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land from the market, and denies generally the other allegations in the petition. As a further defense, it alleges that whatever services were performed by plaintiff were at the special instance and request of Poteet; that plaintiff, for an alleged service claimed by him to have been performed in the sale of said land, charged Poteet \$100, which was paid by him, and that plaintiff was not acting for defendant in the sale of the land; that the relationship existing between plaintiff and Poteet, whereby plaintiff was acting as the agent for Poteet, was unknown to defendant. The reply is a general denial.

The evidence shows the making of the contract as alleged; that defendant and Poteet were introduced to each other by plaintiff; that plaintiff sent several other parties to look at the farm, and continued negotiations with Poteet and defendant up to the 31st of December; that he had correspondence with defendant while defendant was in California and also while he was in Iowa; that early in December he telephoned defendant at Red Oak, Iowa; that defendant soon afterwards visited Falls City and again met Poteet at plaintiff's office; that the matter drifted along, plaintiff having talked to defendant and Poteet every few days during the month of December until the 31st of that month, when all the parties were in plaintiff's office and practically agreed on the terms of sale, for \$20,000; \$14,500 cash, and city property in Falls City, known as the Lindell Hotel, for the other \$5,500; that the next day plaintiff drew up a memorandum of what he understood to be the terms of that agreement, which was signed by Poteet and by plaintiff as agent for defendant; that when he next saw defendant and showed him the memorandum defendant said, "to wait a minute that he wanted to go and see somebody." This occurred on the morning of January 2. That in the afternoon plaintiff received by registered mail the following notice: "The New National Hotel, Falls City, Nebr., Jan. 2, 1908 (1909). W. H. Maddox, Falls City, Nebr. Dear Sir: This is to notify you that I withdraw from the market

my 268 acres of land situated in sec. 35 & 36, Richardson Co., Nebr., known as the Randall farm, now listed with you. Yours truly, W. A. Harding." Defendant attempts to justify the discharge of plaintiff, and his alleged withdrawal of the land from the market, upon the ground that he learned on January 2 that Poteet had paid plaintiff \$100 for his services in connection with the exchange of the hotel property. Thirteen days after defendant wrote plaintiff the letter of January 2, stating that the land was withdrawn from the market, he sold the property to Poteet for \$20,000, conducting his negotiations with another real estate firm, known as Whitaker. Brothers.

The rule invoked by defendant, and the one under which the court evidently directed a verdict in his favor, is that of dual employment. It is contended that because plaintiff was acting for Poteet as to the hotel property, and received pay from him for what he did in relation to that matter, he cannot now recover anything from defendant. There is no trouble with the rule contended for, when rightly stated and understood. It is that a real estate agent, acting for both parties in effecting an exchange of their property, can recover compensation from neither unless the agent's double employment was known and assented to by both of said contracting parties, or, more correctly speaking, by the one sought to be charged with such compensation. The simple question in this case is, did defendant, during the time he was negotiating with plaintiff and Poteet for the exchange of these properties, know that plaintiff was representing Poteet as to the hotel property, and did he assent thereto? If he did not know of it until January 2, at the time he wrote the letter above set out, his action in writing that letter and discharging plaintiff would have been justifiable. If he did know of the relations existing between plaintiff and Poteet, while the negotiations between the three of them were going on, and continued those negotiations from time to time after such knowledge, then his assent to such relations will be conclusively presumed.

Defendant testified that plaintiff introduced him to Poteet; that he and plaintiff and Poteet were carrying on negotiations looking to a sale of the farm; that he never at any time consented to accept the Lindell Hotel as a part consideration for the sale of the farm; that when shown the contract which plaintiff had drawn up with Poteet he refused to sign it; "and that that afternoon, after having talked with Mr. Poteet, he notified Mr. Maddox and the other real estate agents with whom the land was listed that it was taken off the market." In the light of what follows, this testimony is significant. Defendant was then examined as follows, in relation to the sale of the land which he finally made through Whitaker Brothers: "Q. You may state whether as a part of the consideration you took the Lindell Hotel. A. Well, the hotel was never deeded to me. I never had it in my name. Q. Just tell the facts. A. They had the hotel sold for a certain figure to balance up the deal. I got some cash and notes that were short time notes and well secured that I could turn to cash and did turn them right away. Q. When, if at any time during the negotiations between yourself and Mr. Poteet in which Mr. Maddox was concerned, did you learn that Mr. Poteet was paying Mr. Maddox for effecting the sale between you and Poteet? A. I learned that on the 2d day of January. Q. After learning that, what, if anything, did you do with reference to terminating your agency with Maddox? A. I notified him I withdrew it from the market." On cross-examination we have the following: "Q. You made up your mind you wouldn't sell? A. Yes, sir. Q. How soon after did you change your mind? A. Not until after Whitaker Brothers came to me. Q. The transaction was that Whitakers would take the hotel and Poteet would take the farm? A. I don't know who got the hotel, whether Whitakers or who got it. Q. Who paid you the money? A. For the hotel? Q. Yes. A. Whitaker Brothers gave me a check. Q. For the price of the hotel, less so much commission, didn't they? A. Yes. Q. Now,

you knew all the time you were negotiating with Mr. Maddox when you were in the office day after day, you knew Mr. Maddox had the hotel for sale or trade? A. Yes. Q. You knew that? A. Yes." Poteet was called as a witness for defendant, and on cross-examination testified that in purchasing the farm from defendant he turned in the Lindell Hotel as a part of the consideration; that the deed for the hotel was made to Whitaker, and Whitaker paid the money for the hotel to defendant. Bert Whitaker was called as a witness for defendant, and testified that he conducted the sale between plaintiff and defendant; that he now owns the Lindell Hotel; that the deed came to him from Poteet; that he took the hotel in at \$4,500, and that he paid the consideration therefor to defendant. In the light of this record, it is clear that the district court erred in withdrawing the case from the jury and directing a verdict for defendant. There is no theory upon which defendant's conduct can be justified. He had obtained the services of plaintiff in the effort to sell his farm, and he actually sold the farm to the customer produced and introduced to him by plaintiff. He knew, by his own admission, during all the time negotiations were going on, that plaintiff was representing Poteet, so far as the hotel property was concerned. It is therefore clear that there was no fraudulent or improper concealment on the part of plaintiff in relation thereto, but that his relations with Poteet were fully understood. The fact that defendant did not learn until January 2 the amount which Poteet was to pay plaintiff for his services in connection with the hotel is, under the circumstances of this case, entirely immaterial. He knew that plaintiff was representing Poteet in that regard, and common knowledge and every-day experience would have told him that plaintiff expected remuneration from Poteet therefor. We are unable to discover any deceit or improper practice on the part of plaintiff. The letter of January 2, claiming that the land was withdrawn from the market, looks like a mere subterfuge. That the at-

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tempted withdrawal of the land from the market should not, under the circumstances shown, defeat plaintiff's right to recover his commission, is well shown in *Smith v. Anderson*, 2 Idaho, 495, *Gottschalk v. Jennings*, 1 La. Ann. 5, and *Knox v. Parker*, 2 Wash. 34.

Plaintiff was clearly entitled to go to the jury upon the evidence introduced, and, for the refusal of the court to permit him to do so, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

MEEK COMPANY, APPELLANT, v. HENRY ROHLFF, APPELLEE.

FILED APRIL 20, 1912. No. 17,075.

1. **Sales: ACTION: EVIDENCE.** The evidence examined, and set out in the opinion, *held* insufficient to sustain the verdict and judgment.
2. **Trial: DIRECTING VERDICT.** "When the evidence which has been offered is not sufficient in *law* to make out the case of the party who has offered it, it is the duty of the court to so instruct the jury." *Hiatt v. Brooks*, 17 Neb. 33.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed with directions.*

Baldrige, De Bord & Fradenburg, for appellant.

George W. Shields and Robert J. Shields, contra.

FAWCETT, J.

Action by plaintiff in the district court for Douglas county to recover for metal signs manufactured and delivered by it to defendant under a written order. Verdict and judgment for defendant, and plaintiff appeals.

On November 19, 1908, defendant signed and delivered to one Brown, a member of the firm of Frederickson, Brown & Chesney, plaintiff's agents at Minneapolis, an order for

500 stamped, framed signs for an expressed consideration of \$200. In the order it was stated: "No proof wanted. Ship via Freight F. O. B. Coshocton. Special instructions—Use your own judgment as to displaying ad. Get signs as soon as possible." The order also recited: "The approval or acceptance of this contract being based upon the written requirements shown hereon, it is understood and agreed that any verbal alterations or agreements between buyer and salesmen, either now or hereafter, are not covered by this contract, and shall not be binding upon the parties hereto." The signs were promptly manufactured and shipped to and received by defendant. When received they did not meet with the approval of defendant, and he notified plaintiff that he would not accept them; whereupon, this suit was instituted.

The petition alleges the sale and delivery of the signs, the refusal of the defendant to receive the same, the amount due, and prays judgment. The answer denies all allegations of the petition not admitted; admits that he entered into the contract, but denies that the copy set out is a true copy; and alleges: "That prior to the time of the writing of said alleged contract, defendant had purchased from plaintiff other signs of a similar character, and one T. M. Brown, who was of the firm of Frederick, Brown & Chesney, the agent of the plaintiff, to induce the defendant to give him an order for said 500 signs, said to defendant that if he, the defendant, would leave it entirely to the Meek Company it would furnish to him 500 signs for \$200, which in every respect would be as good and attractive as the ones that had been previously sold by the plaintiff to the defendant, and that said signs should be satisfactory to the defendant; that the signs that had been purchased by him from plaintiff prior to said time were first-class and artistic, whereas the signs sued for were botches and almost worthless; that there was neither art, nor good workmanship, nor taste exhibited in any of said signs; that when said signs came he refused to accept them and so notified the plaintiff." The

reply is a general denial. It is said by defendant that the reply was not filed until the conclusion of the trial, but no motion was made to strike it from the files, nor objection of any other kind interposed in the court below. We think it is too late to attempt to assail it here.

On behalf of plaintiff it was shown by the witness Selby that he had been treasurer of plaintiff since its organization; that the business of plaintiff was that of manufacturing all kinds of advertising goods, including metal signs; that it received defendant's order on or about November 19, 1908, through their agents at Minneapolis; that the order was duly entered on the books of the company and filled by them, and shipped on December 8, 1908; that he had examined the signs before they were shipped, and that they were in first-class condition and made exactly in accordance with the order sent them; "that they used their best judgment in regard to the display, and that they were first-class in every respect, both as regards the lithographing and lettering." The witness Townsend testified that he was in charge of the metal sign department of plaintiff; that he recalled the Rohlf order; that the order was turned over to his department and filled; that he personally examined the signs before they were packed and found that they were first-class in every respect and very attractive; "and as there were no instructions with the order as to the character of the lettering which should be done, the plaintiff followed its own judgment and printed the advertisement in the usual way with a shade of green in harmony with the color of the picture used; that a different advertisement could have been put on, had it been ordered, but that it was left to him and he followed his own best judgment as to what he thought would please the customer, and that the signs were made in exact accordance with the terms of the order, and that they were duly shipped to the defendant herein and that he had accepted the same, and that the only complaint received by the plaintiff from the defendant was that the printing of the signs was not according

to his liking." Witness Brown testified that he was an advertising broker and represented plaintiff in the solicitation of advertising matter; that on plaintiff's behalf he solicited from defendant and took the order for the signs in controversy; that defendant told him he was in a great hurry for these signs, and said it would be unnecessary to submit the sketch, but to let the artist display the "ad" in what he thought was the best way; "that he talked with Mr. Rohlff relative to the coloring to be used in the lettering, and Mr. Rohlff agreed with him that he had best let the artist use his own judgment in order to get the most harmonious effect, and for that reason Mr. Rohlff said that it would be unnecessary to submit a sketch, but to let the artist use his best judgment and hurry the signs along as fast as possible."

Defendant testified that he had been in the wholesale liquor business about 15 years, and had previous to this time ordered other signs from plaintiff; that he signed the order, copy of which was attached to plaintiff's deposition; that Mr. Brown, representing plaintiff, called upon him and showed him the sign in controversy without any letters on it and wanted to know if he couldn't sell it to him; that he agreed to buy it, "if he could have some nice satisfactory advertising on it and give him as nice letters as he had on the other signs, and he gave him the wording to put on it and suggested to get a good flashy sign; that, at the suggestion of Mr. Brown, he followed his advice and left it entirely to the artist." Defendant then offered in evidence the sign which he had previously purchased of plaintiff, and also one of the signs involved in the suit, which he had had altered by a sign painter in Omaha. He further testified that he had been in the saloon business for 23 years, was somewhat familiar with the methods of advertising, felt competent to examine cards, pictures, etc., and to state whether they were good advertising or not, and that the sign furnished by plaintiff "was bad advertising, in that it was dull, not a bit attractive, looked like a rubber stamp job, and not attractive to the

eye." The witness Zerzan, introduced by defendant, testified that his occupation was advertising novelties; that he was a sign painter by trade and also painted some pictures; that he had examined the signs in controversy; "that he would consider it faulty in that the coloring in the lettering was not bold enough for advertising purposes, and that the picture in itself is artistic, and the design in general, but that the lettering, or lay-out, could be improved upon, that is, that the space of the letters and the style of the letters could be made better; that he has taken several copies of this sign and experimented them with other colors for letters, and in order to make exhibit No. 2, being the sign in question herein, a good advertising card, a good strong color should be used for the lettering, something that is a slight contrast from the background, which would make it more effective and more attractive;" that he had retouched three of the signs, and that "for advertising purposes he considered it decidedly poor judgment in using the color that they did and making the display they did on the sign; and that it was not good workmanship." The witness Boder, called by defendant, testified that he was by occupation a sign painter. Upon being shown the sign in controversy, he testified "that his idea was that the coloring was not strong enough or not bold enough for advertising purposes, and if the colors were strengthened it would improve the artistic effect of the picture, and that if the coloring was stronger it would not in any way lessen the artistic effect of the picture, and the picture would be just as attractive notwithstanding bolder colors were used and such as were more easily seen."

The above is almost a complete transcript of the evidence set out in the abstract, and the most that can be said for it is that it shows that the judgment of defendant and his witnesses as to the artistic display of the lettering upon the sign (which, it is stated, was the picture of a beautiful woman) does not tally with the judgment of the plaintiff's officials and employees, who manufactured

the signs. It is urged by defendant that under the talk between defendant and the agent Brown, at the time the order was taken, the matter of display was left to the judgment of plaintiff's "artist;" that there is no evidence to show that plaintiff's artist ever had anything to do with the matter or his judgment obtained; that "these signs were metal signs, and various workmen must necessarily work upon them, blacksmiths, tinsmiths, or machinists must prepare the metal, artists must design the picture of the woman, and sign painters or persons skilled in advertising display would be supposed to paint or print the signs or direct how they should be done, so that they might just as well, in order to prove that they had done in accordance with the contract as construed by us, have called the blacksmith, the machinist, or the tinsmith, or even the janitor. The jury, having seen the sign sent by the plaintiff to the defendant, had a right to suppose from its appearance that they had chosen the janitor." This contention is quite readable, but not persuasive. The trouble with it is, the evidence shows that this work was done in the metal sign department, of which the witness Townsend was in charge; that, as there were no instructions with the order as to the character of the lettering which should be done, plaintiff followed its own judgment and printed the advertisement in the usual way; "that a different advertisement could have been put on, had it been ordered, but that it was left to *him* and *he* followed his own best judgment as to what he thought would please the customer." Parties of full age, free from restraint, are competent to contract as they see fit. In ordering the signs in controversy, defendant had a right to demand a sketch or proof of the advertising, including the color of the lettering thereon, and to use his own judgment, or he could agree to be bound by the judgment of the plaintiff. He saw fit to do the latter, and, there being no evidence in the record that plaintiff, through its officers and employees, was guilty of any bad faith, he is bound by their judgment. If men will persist in making improvi-

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dent contracts, they must suffer the consequences thereof. It is not the province of the court to extricate them therefrom. In *Doolittle v. Callender*, 88 Neb. 747, a very similar case, we said: "Plaintiff was in the advertising business, making a specialty of furnishing this kind of cuts and of reading matter to accompany the same, and, if defendant saw fit to make a contract to take cuts and reading matter for a year and to leave the design of the cuts and the wording of the reading matter to plaintiff's judgment, that was defendant's own concern."

The evidence, in our judgment, utterly fails to establish any defense to plaintiff's claim, and its motion for a directed verdict, at the conclusion of the trial, should have been sustained. Having reached this conclusion, a consideration of the other point assigned in plaintiff's brief, and discussed by the parties, is unnecessary.

The judgment of the district court is reversed and the cause remanded, with instructions to render judgment for the amount of plaintiff's claim, with interest.

REVERSED.

STATE, EX REL. JAMES A. BENSON, APPELLEE, V. MAYOR
AND COUNCIL OF THE CITY OF HASTINGS, APPELLANTS.

FILED APRIL 20, 1912. No. 17,504.

Elections: CONSTITUTIONAL OFFICERS: POLICE MAGISTRATE: POWER OF LEGISLATURE. The office of police magistrate being a constitutional office, and the constitution having fixed the time when such officer shall be elected, the time when, after election, he shall enter upon his term of office, and the duration of such term, the requirements of the constitution in those particulars must be complied with; and any attempt on the part of the legislature to provide for the election of such officers in any other manner or at any other times than fixed by the constitution is void.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

John M. Ragan and George W. Tibbets, for appellants.

John C. Stevens, contra.

W. L. Hand, amicus curiæ.

FAWCETT, J.

Relator, having obtained a certificate of election as police magistrate for the city of Hastings at the general election in 1911, presented to the mayor and city council his certificate, oath of office, and bond in the sum required by law. The mayor and council refused to approve the bond, or to recognize relator's election to such office, upon the sole ground that at the time relator was elected there was no vacancy in such office and hence there was no such officer to be elected. Thereupon, relator brought proceedings in mandamus to compel the mayor and council to meet and approve the bond. The district court awarded relator a peremptory writ as prayed, and respondents appeal.

The city of Hastings belongs to that class having more than 5,000 and less than 25,000 inhabitants. It appears that at the city election in April, 1909, one Joseph Meyer was elected police magistrate for a period of two years; that he qualified and discharged the duties of the office for that period; that at the city election on April 4, 1911, Meyer was re-elected; that the vote was canvassed by the city council on April 10, and on April 11 he qualified as such officer. During all of those times, the city of Hastings acted under the provisions of article III, ch. 13, Comp. St. 1907, section 11 of which provided that the general city election in all cities governed by the act should be held on the first Tuesday in April annually. Section 12 provided that at the annual election held in April, 1907, there should be elected, with other officers, a police judge for two years, and biennially thereafter. On April 8, 1911, an act, with an emergency clause, was ap-

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proved (laws 1911, ch. 23), defining the district of a police magistrate in cities and villages as co-extensive with the corporate limits of such city or village, in which he is elected, and three miles beyond such limits. Section 9 provided: "The election of a police magistrate shall take place at the next general election to be held on the Tuesday succeeding the first Monday of November, 1911, and on every alternate year thereafter, and the terms of office of police magistrate shall begin on the first Thursday after the first Tuesday in January next succeeding his election, and he shall continue in office until his successor shall be elected and qualified." At the election thus provided for, relator was a candidate, was elected, and received his certificate of election. One question argued in the briefs is, did the act of April 8, 1911, repeal the prior act, if not in terms, at least by implication? Counsel for respondents admits that if the act of 1911 did by implication repeal so much of section 8511, Ann. St. 1907, as fixes the election of the police judge in Hastings at the April general election, the judgment of the district court is right; but contends that, if it did not do so, the judgment should be reversed. We think the decision in this case must rest upon more substantial grounds than the repeal of the act referred to.

In the constitution of 1875 we find the following provisions: Section 1, art. VI: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns."

Section 13, art. XVI: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election which shall be on the second Tuesday in October, 1875. All state, district, county, precinct and township officers, by the constitution or laws made elective by the people, except school district officers, and municipal offi-

cers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. Judges of the supreme, district and county courts, all elective county and precinct officers, and all other elective officers, the time for the election of whom is not herein otherwise provided for, and which are not included in the above exception, shall be elected at the first general election, and thereafter at the general election next preceding the time of the termination of their respective terms of office."

Section 18, art. VI: "Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law."

Section 20, art. VI: "All officers provided for in this article shall hold their offices until their successors shall be qualified, and they shall respectively reside in the district, county or precinct for which they shall be elected or appointed. The terms of office of all such officers, when not otherwise prescribed in this article, shall be two years. All officers, when not otherwise provided for in this article, shall perform such duties and receive such compensation as may be provided by law."

In *State v. Moores*, 61 Neb. 9, we held: "The office of police judge or police magistrate of an incorporated city is called into existence by the constitution." See, also, *Moores v. State*, 63 Neb. 345.

In 1897 the legislature passed an act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers, and government, and repealed the act of March 30, 1887, in relation thereto. Laws 1897, ch. 10. This act provided (sec. 13) that the first city election in all cities governed by the act "shall be held on the sixth Tuesday after this act goes into effect, and the next general city election on the first Tuesday in March A. D. 1900, and all succeeding general city elections every three years thereafter. Such elections shall be held at the same place as was the general election for state and county officials last preceding such city election.

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The officers to be elected at such election shall be a mayor, police judge * * *; they shall each and all be elected by a plurality of all votes cast at said election for such officials respectively, and shall, when properly qualified, hold their offices for the terms herein designated, viz.: The terms of the officers first elected shall commence on the third Monday succeeding their election, and they shall hold office until the third Monday in March, A. D. 1900, and until their successors shall be elected and qualified, and all subsequently elected officers shall hold office for the term of three years, commencing on the third Monday succeeding their election, and shall hold their office until their successors shall be elected and qualified."

The constitutionality of this act was assailed by an original action in this court in the nature of *quo warranto*. *State v. Stuht*, 52 Neb. 209. On page 214 it is said: "The first point discussed by counsel is in relation to the police judge, and the provisions of the new act fixing the time of the election of said officer and the duration of his term of office. The section of the act of 1897 to which our attention is particularly directed in this connection is as follows: (Section 13 of the act of 1897 set out in full.) It will be noticed that by the provisions of the section quoted the terms of office of the police judge, after the first one, are fixed each at three years." The court then quotes section 1, art. VI, above set out. Section 20 is also set out. Continuing it is said (p. 216): "Under the act or charter of 1887, which the act of 1897 by its terms repealed, there had been elected a police judge, whose term of office, fixed by the constitution, will expire in January, 1898; this term could not be abridged by statute, hence the act of 1897, to the extent it purports to affect such term, is invalid; also such portion of it as makes the term of office of a police judge three years instead of the constitutional term of two years is of no effect." It will be seen that we there hold that the act of 1897, so far as it related to the office of police judge, was void upon two grounds: (1) To the extent it purported to affect the

term fixed by the constitution; and (2) to the extent that it sought to extend the term of a police judge to three years. Continuing it is said: "It seems quite clear that the mere designation of the time at which the police judge should commence his term of office, and the fixing the length of his term of office at three years, did not possess such significance or importance that the determination of the exact time of the inception of the term or its duration could, separately or combined, have operated as an inducement for the passage by the legislature of this act, containing, as it did, what was intended for a complete and entire scheme or plan for the organization and government of a class of cities; and, further, it seems clear that had the legislators known that either the time of the commencement of the term stated in the law, or the exact length of the term as fixed, must be abandoned, they would not have felt constrained to withhold approval from the other and more important parts of the act." Again it is said (p. 217): "The law of 1897 provided for a police judge and prescribed fully his jurisdiction, powers, duties, etc. The only defects in the law were that his term of office could not be for the length of time stated, and might not commence at the time fixed. * * * Turning our attention now directly to the enactment inasmuch as it affects the police judgeship and the term thereof, it is clear that there is a police judge, whose term of office, being established by the constitution, cannot be interfered with or shortened by the legislature or its enactments. * * * (p. 221) It is also urged that to say that an incumbent, under the circumstances developed in this case, may hold the office until the election and qualification of a successor is equivalent to saying that a legislature may fix a term of office of indefinite duration, by repealing the law providing for the election of a successor. The legislature could not do what has just been stated. It might attempt it, but it would have no force or effect in regard to an office created by the constitution." The only reasonable deductions to be drawn from the

above quotations are that the defects in the law of 1897 were that the term of office of a police magistrate could not be for the length of time therein stated and could not commence at the time fixed. In other words, that the office of police magistrate being a constitutional office, and the constitution having fixed the time when such officer shall be elected, the time when, after election, he shall enter upon his term of office, and the duration of that term, the requirements of the constitution in those particulars must be complied with; and that any attempt on the part of the legislature to provide for the election of police magistrates in any other manner is absolutely void. Section 13, art. XVI of the constitution, provided that the general election should be held on the Tuesday succeeding the first Monday in November in each odd-numbered year; and section 20, art. VI, that their term of office should be two years.

By the act of April 8, 1911, the legislature appears, for the first time, to have caught up with the constitution and provided for the election of police magistrates in accordance therewith. Section 9, art. II, ch. 14a, Comp. St. 1911, provides for their election on the Tuesday succeeding the first Monday of November, 1911, and on every alternate year thereafter, and that their terms of office shall begin on the first Thursday after the first Tuesday in January next succeeding their election.

A distinction is attempted to be drawn, in the briefs of counsel for relator, between the designations police judge and police magistrate. It is so apparent that those designations refer to one and the same office that this contention does not require discussion. That this court so considered them is shown by the quotation from *State v. Moores, supra*.

Under the terms of the constitution above set out, and under the authority of our former decisions above cited, we hold that the act of the legislature, in authorizing cities of the class to which the city of Hastings belongs to elect police magistrates in April and to provide that their term

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of office should run for two years from that time, was void, and that the only constitutional election of a police magistrate for the city of Hastings, shown by the record in this case to have ever been held, was the election in November, 1911; and that at such election relator was duly elected to the office of police magistrate.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. WILLIAM T. THOMPSON, ATTORNEY GENERAL, RELATOR, V. JOHN J. DONAHUE, CHIEF OF POLICE OF THE CITY OF OMAHA, RESPONDENT.

FILED APRIL 20, 1912. No. 16,802.

1. **Reference: FINDINGS OF REFEREE: REVIEW.** When a referee, who has been appointed by the trial court to take evidence and report the findings of fact and conclusions of law, makes his report, the correctness of his findings and conclusions may be challenged by filing exceptions and objections thereto, stating the grounds of such objections. No motion for a new trial is necessary for that purpose.
2. ———: **REPORT OF REFEREE: MOTION FOR NEW TRIAL.** The statute (code, sec. 316) allows a motion for a new trial to be filed at the term that the report of the referee is "rendered." It must be within three days after the "verdict or decision." This limitation of three days does not apply to the report of a referee.
3. **Quo Warranto: JURISDICTION OF SUPREME COURT: REMOVAL OF PUBLIC OFFICERS.** Section 1a, ch. 71, Comp. St. 1911, provides for the removal of public officers for certain causes, and the proper procedure under this statute is by *quo warranto*. This court has original jurisdiction of *quo warranto* by section 2, art. VI of the constitution.
4. **Pleading: INDEFINITENESS: REMEDY.** If the allegations of an information are indefinite, the remedy is by motion. A general demurrer will not be sustained if the information as a whole charges a wilful neglect of duty within the provisions of the statute.

5. **Officers: REMOVAL: POLICE OFFICERS.** While the statute has more ready application to officers who are elected or appointed for fixed terms, and are not subject to removal under other statutes and upon similar grounds, it must be held to extend to inferior police officers in a proper case, since they are expressly included.
6. ———: ———: **EVIDENCE.** Prosecutions under this statute are highly penal in their nature, and the evidence must be clear and satisfactory. To wilfully fail, neglect or refuse to enforce a law involves more than oversight or carelessness or voluntary neglect. It must be prompted by some evil intent, or legal malice, or at least be without sufficient grounds to believe that he is performing his duty.
7. **Municipal Corporations: ENFORCEMENT OF LAWS: CHIEF OF POLICE.** The enforcement of the law in cities of the metropolitan class is placed by the legislature directly under the control of the board of fire and police commissioners, of which the mayor is principal officer. The chief of police is appointed by the board and removable at its pleasure. It is the duty of the mayor to "order, direct and enforce" the law. If the board directs in what manner and to what extent the law for the suppression of prostitution and the sale of intoxicating liquors shall be enforced, and the chief of police in good faith believes it is his duty to be governed by the established policy of the board and the directions of the mayor, and faithfully enforces the law accordingly, it cannot be found that he did "*wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce.*"

ORIGINAL application in *quo warranto* to oust respondent from the office of chief of police of the city of Omaha. *Dismissed.*

Grant G. Martin, Attorney General, George W. Ayres and Arthur F. Mullen, for relator.

W. J. Connell, contra.

SEDGWICK, J.

These proceedings were begun in this court by the attorney general, upon the direction of the governor, under the provisions of sections 1a, 1b, ch. 71, Comp. St. 1911, commonly called the "Sackett Law." The respondent is chief of police of the city of Omaha. The action was be-

gun in August, 1910. A referee was appointed to take the evidence and report his findings of fact and conclusions of law. The evidence taken before the referee is contained in nine large volumes of nearly 500 pages each. The questions presented are of more than usual importance. It being the first attempt to enforce the act under which it is brought, able counsel on both sides have given unusual attention to the case and have ably and carefully presented the numerous questions involved. The case has been greatly delayed, perhaps necessarily so under the circumstances, although ordinarily a case of this nature and importance should be promptly heard and determined. The counsel and the referee are to be commended for the thorough work which has been done. The referee made quite comprehensive findings of fact and conclusions of law, reporting that some of the charges against the respondent were not sustained by the evidence and that others were, and that the allegations of the information were sufficiently proved and that the prayer ought to be granted and the respondent removed from his office.

1. After the referee had filed his report, the respondent not having filed any motion for a new trial, the relator moved for judgment upon the report. It is now earnestly contended that a motion for a new trial is indispensable to entitle the respondent to any review of the proceedings by this court and that the motion for judgment ought to be sustained. This argument is derived principally from the provisions of sections 316 and 317 of the code. In *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286, the case was tried to a jury in the district court and was brought to this court upon a petition in error. The motion for a new trial in the district court was filed on the fourth day after the verdict was rendered, and it was held that the motion was filed too late. The opinion contained what purports to be a quotation of section 316 of the code. The quotation, however, is inaccurate. Section 316 is as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered,

and, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." It does not appear from the opinion that the decision in the case was rendered by the district court more than three days before the motion for a new trial was filed, and the court manifestly construed the section to mean that the motion must be filed within three days after the verdict, whether any final decision had been rendered in the case or not. If this is a necessary construction of the statute, the construction ought not to be extended to the report of a referee. The language of the section forbids such a construction. The application for a new trial in the district court must be made at the term that the report of the referee is filed and within "three days after the verdict or decision was rendered." There is a substantial reason for omitting the report of the referee in this clause of the statute, as it would be impracticable in many cases to comply with it, if the motion was required to be filed within three days after the report was rendered. In this case the record shows that the respondent had no notice of an unfavorable report of the referee until more than three days after the report had been filed, and if the report of a referee had been included in the three days' limitation it would in many cases practically prohibit a review in this court of the judgment of the lower court in cases that come here by appeal. This contention of the relator, then, is without merit. The respondent filed exceptions to the report of the referee, and this appears to be the proper procedure to present to the court in which the reference is had the matters relied upon to avoid the findings and conclusions of the referee. In such cases the motion for a new trial is addressed to the trial court and calls the attention of the trial court to the supposed errors in the proceedings and judgment. In law cases such motion is necessary in order to obtain a review in the appellate court.

2. A motion was filed by the respondent which was treated by the counsel and the court as a general demurrer to the information. This motion was overruled, and the respondent now contends that this ruling was wrong and that the information fails to state any cause of action against the respondent. In this connection it is urged that this court has no jurisdiction to enforce this statute. We are, however, satisfied that this court has jurisdiction. The constitution prescribes the original jurisdiction of this court. Section 2, art. VI of the constitution, provides that this court shall have "such appellate jurisdiction as may be provided by law." Its duties as a court of review may be enlarged, but it has been frequently held that the legislature cannot increase its original jurisdiction. The statute under which the proceedings are brought directs that the proceedings shall be begun in this court by the attorney general when directed by the governor. This provision would no doubt be ineffective unless the character of the proceedings was such that this court would have original jurisdiction thereof under the provisions of the constitution. The first section of the act provides that under certain circumstances officers shall forfeit their office and be removed therefrom. There can be no doubt of the validity of this provision, at least when applied to offices created by the legislature; and when an officer has forfeited his office and is subject to removal therefrom, there can be no doubt that *quo warranto* is the correct remedy, and this court is given original jurisdiction in all cases of *quo warranto* by the section of the constitution above cited. Whether the provision of the second section of the statute would in any way limit the jurisdiction of the district courts in such cases, it is not necessary now to determine.

The next contention upon the motion was that the information does not charge any acts or omissions on the part of the respondent that would forfeit his right to the office under the provisions of the statute. The informa-

tion is too long to copy in full. It alleges specific instances of wilful refusal on the part of respondent to make arrests for crimes when required by the mayor and board of fire and police commissioners to do so. Many of the allegations of the information are quite indefinite. No motion was made to require a more exact statement in any of the matters alleged. We will not discuss now this objection to the information. It is sufficient to say that, under our view of the law, the information was not subject to a general demurrer.

3. Many reasons are urged for the conclusion that this prosecution cannot be sustained. It is said that the act was never intended to apply to officers who are appointed by local authorities and who hold their offices at the will of the appointing power, if the duties of their office are neglected. It may be conceded that many substantial considerations are urged for such a construction of the statute. A discussion of other points in controversy will lead to a further consideration of this matter. The occasion for the statute is much more manifest in the case of officers who are elected or appointed for fixed terms and not subject to removal under other provisions of the statute upon similar grounds and for similar reasons as are contemplated in the statute in question, and yet the language of the first section of the act is so broad and general as to compel the construction that it must, in some instances at least, apply to inferior officers removable by the local authorities from which they receive their appointments. The section specifically names police officers and police commissioners, with the general words "or other officers," and these officers cannot in all cases be exempt from its provisions.

4. The next contention is that the evidence does not show that this respondent did "wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce." Notwithstanding the large amount of evidence taken by both parties, it appears that the evidence as to the principal facts upon which the determination of this

case depends is not substantially conflicting. The contention of the state is that the respondent has failed in many respects; that he has failed to enforce the liquor laws of the state and has neglected and refused to arrest and prosecute known violations of this law; that he has also failed to enforce the law against gambling; and that he has failed and refused to enforce the laws of the state and the ordinances of the city of Omaha, and the orders of the board of fire and police commissioners for the suppression of prostitution. The evidence abundantly shows that in all these respects the law has been openly, notoriously and continuously violated in the city of Omaha. According to this evidence there is and has been for more than 30 years continuously a large district embracing several blocks upon some of the principal streets in that city notoriously known as the "red-light district," in which prostitution and the illegal sale of intoxicating liquors, and in many cases gambling and other vices, have been and are so openly and brazenly practiced that all citizens of Omaha, and all citizens of the state, whose attention may have been called to the matter must be aware of existing conditions. Members of the police force have patrolled this district. At least two of these officers are continually in service there. They have seen these flagrant violations of the law from day to day for many years. They no doubt have the most direct and certain knowledge of the facts, but that knowledge extends beyond them to the police captain and to the chief of police, the board of fire and police commissioners, the city council, the state legislature, and the people of the state at large. All have sufficient knowledge to be responsible for existing conditions.

The governor and the attorney general, assisted by a number of public spirited citizens, have attempted, and without doubt in good faith, to use this new statute to compel a better enforcement of the law.

Are the provisions of the statute applicable to the case made against the respondent? Did he at the times and in

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the manner specified "wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce"? The statute governing cities of the metropolitan class gives the mayor and city council ample power to make and enforce regulations for the "good government, general welfare, health, safety and security of the city and the citizens thereof." Comp. St., ch. 12a, sec. 144, subd. 25. The board of fire and police commissioners consists of the mayor, who is *ex officio* chairman of the board, and four electors of the city, and the mayor and council are by the statute given authority to remove the members of the board for misconduct in office or failure to discharge their duties. Section 60. The board of fire and police commissioners have power to appoint the chief of police and other police officers, and to remove the same "whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the more effective working or service of the police department" (sec. 62); and it is made the duty of the board "to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, promotion, removal, trial or discipline of said officers, men and matrons, as said board shall consider proper and necessary" (sec. 63). Section 64 provides: "It shall be the duty of the mayor to enforce the laws of the state and the ordinances of the city, to order, direct and enforce, through the officers of the police department, the arrest and prosecution of persons violating such laws and ordinances, to co-operate with and assist the sheriff of the county in suppressing riots and mobs, and the arrest and prosecution of persons charged with crimes and misdemeanors." The statute also provides that the chief of police shall be subject to the orders of the mayor and board of fire and police commissioners, and that "all orders of the board relating to the direction of the police force shall be given through the chief of police" (sec. 67).

To our minds the most important question presented in this case is: Under the provisions of the statute, what

shall be regarded as a wilful failure to enforce the law? The next most important question, and one which it is necessary to consider, in order to determine the question already stated, is: What laws is it made the duty of the chief of police, upon his own initiative, to enforce? The decision of this court in *Minkler v. State*, 14 Neb. 181, is cited by the relator as determining what should be regarded as wilful refusal to enforce the law. In that case the county surveyor of Otoe county was removed from office "for wilful maladministration in his office." It appears that in his capacity of county surveyor, and while acting as such, he "removed, and carried away all the government landmarks and the stones set up to mark the section, half-section, and quarter-section corners' of certain sections of land." The court said: "The removal of established monuments and landmarks was unlawful and forbidden even from the time of Moses, the great law-giver." And it was shown that he "knew the true character of the corner stones." The court quotes from the case of *State v. Preston*, 34 Wis. 675. In that case the defendant was prosecuted for obstructing the highway. He offered to prove that the supervisor of the town had determined that there was no highway at the place in question, and instructed him to place the fence where he did. This the court held to be a good defense. This court distinguished that case from *Minkler v. State*, and, no doubt, properly so. Minkler acted upon his own authority. It is impossible to believe that he did not know the nature of government landmarks, and did not act wilfully in removing all of them from several sections of land. In an action to remove a county treasurer for wilful misconduct or maladministration in office, the supreme court of Iowa, in defining wilful misconduct, used this language: "What is the meaning of 'wilful misconduct' as that phrase is here employed? Manifestly it is not applicable to every case of misconduct, nor to every mistake, or every departure from the strict letter of the law defining the officer's duties, but only to wilful wrongs or

omissions on his part. The word 'wilful,' like most other words in our language, is of somewhat varied signification according to its context and the nature of the subject under discussion or treatment. Frequently it is used as nearly or quite synonymous with 'voluntary' or 'intentional,' and evidently this is the interpretation given it by the trial court in the case before us. But when employed in statutes, especially in statutes of a penal character, it is held with but few exceptions to imply an evil or corrupt motive or intent." *State v. Meek*, 148 Ia. 671. And, in an earlier case, the same court said: "Every voluntary act of a human being is intentional, but, generally speaking, a voluntary act becomes wilful in law only when it involves some degree of conscious wrong or evil purpose upon the part of the actor, or at least an inexcusable carelessness or recklessness on his part, whether the act be right or wrong." *State v. Willing*, 129 Ia. 72.

Prosecutions to remove officers are penal in their nature, and, while it is generally held not to be necessary that the charges should be proved beyond reasonable doubt, still it is universally considered that the evidence supporting the charges must be clear and satisfactory. The respondent has been connected with the police force for nearly 20 years, and appears, during all that time, to have been in good standing with his superiors. If he continues in the office he will soon be entitled to a substantial pension for the remainder of his life. If he is found guilty in these proceedings he will be deprived of pension, and his character and efficiency as an officer placed in doubt. An action of this nature is highly penal, and to justify a conviction the charges should be clearly and substantially proved. Under such circumstances, wilful neglect to perform an official duty is considered to be something more than oversight or carelessness or a merely voluntary neglect. It must be prompted by some evil intent, or legal malice, or without sufficient ground for believing himself justified in the course pursued. *State v. Preston*, 34 Wis. 675, and cases cited; *Felton v. United*

States, 96 U. S. 699. This construction has been adopted by this court: "But where such act results from a mere error of judgment or omission of duty without the element of fraud, or where the alleged negligence is attributable to a misconception of duty rather than a wilful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state." *State v. Hastings*, 37 Neb. 96.

We have said that the citizens of the state and the state itself, in its governmental capacity, are not entirely free from responsibility for the conditions which are complained of as existing in the city of Omaha. There has been some difference of opinion expressed by the courts as to the conditions which will justify the state in interfering with the affairs of local municipal government, but there have been no differences of opinion upon the proposition that the state has the jurisdiction and the duty to see that its laws for the government and protection of its citizens are observed and enforced in all parts of the state. If the local authorities are unwilling or unable to enforce these laws the state may intercede and directly control the police power necessary to their enforcement. The enforcement of the law in cities of this class is now placed by the legislature directly under the control of the board of fire and police commissioners, of which the mayor is the principal officer. If this board is selected by the voters of the city it will presumably, so far as it is able, compel such enforcement of the law as the majority of its constituents desire and command. If the laws of the state are disregarded in any locality because of the perversity of public sentiment, and the state is compelled to interpose for their enforcement, and to that end selects the immediate governing power of the instrumentalities of its enforcement, they will presumably enforce the law as the enlightened intelligence of the people of the state at large demand.

In 1897 a law was enacted by the legislature which provided that the board of fire and police commissioners of

cities of the metropolitan class should be appointed by the governor of the state. This statute was held by this court to be constitutional. *Redell v. Moores*, 63 Neb. 219. Such appointments were made accordingly. Afterwards this statute was repealed, and the selection of these officers was again confided to the voters of the municipality. In this case the evidence shows without conflict that there was a difference of opinion among the members of the board of fire and police commissioners. Mr. Karbach, one of the members, insisted that the laws, the violation of which is now complained of, were not adequately enforced. The mayor and the other members of the board appear to have disagreed with him, and they, apparently without his assistance, determined upon and adopted the policy of the board with regard to the enforcement of these laws. The difference of opinion in the board in regard to the suppression of these violations of the law was as to the degree that the violations should be tolerated. Mr. Karbach did not insist that these violations of the law could be wholly suppressed. He was called as a witness and testified: "I thought that a limited number of them (houses of prostitution) in the prescribed district was a necessary evil. As a member of the fire and police commission I was in favor of a limited number of houses of prostitution in the 'red-light district.'" Mr. Karbach testified that he introduced a resolution before the board of fire and police commissioners, the substance of which was: "The chief of police 'is hereby instructed to arrest and prosecute all parties selling liquor illegally,'" and that the resolution did not receive a second. He further testified: "The board, I think, practically, with the exception of Mr. Paige, agreed to allow those houses to open again on condition that they put curtains on all of the doors and windows, and stop soliciting of any kind. * * * I offered a resolution, looking toward a more strict enforcement of laws and ordinances. This resolution received no second, and didn't go into the minutes. In October I offered another resolution instructing the chief

to stop the illegal sale of liquor. There was no second to this motion. * * * My feeling of animosity toward the chief is not as strong as it is toward the other members of the board." They all appear to have considered that an attempt to wholly suppress or separate the social evil and the sale of liquor to be unsuccessful, they having been associated together in Omaha for more than 30 years. Two detectives were employed to investigate existing conditions as to the violation of the liquor law. They made quite an extensive report of existing conditions, and of the attempt that had been made to enforce the law, and the results. This report was submitted by the respondent to the board of fire and police commissioners and was discussed and acted upon by them. It appears that the entire board of fire and police commissioners considered these houses a necessary evil, and that the proper enforcement of the law did not require their suppression. Even the member who thought that the prosecutions were insufficient entertained this view. In this the board must have been supported by a majority of the voters of the city of Omaha. This policy was the foundation of all of the violations of law complained of. The evidence shows that all other violations of the law, such as are complained of, were practiced freely in these houses, and could not be suppressed if these houses were allowed to continue. It may be that the chief of police and every member of the police force were mistaken in supposing that they ought to be controlled by this policy of enforcing the law, but we cannot believe that they were guilty of a wilful refusal to do their duty because of this mistaken notion that they should be governed by the policy of their superiors.

It appears that the governor, after making some investigation, wrote to the respondent specifying in detail instances of the violation of the law. After the respondent received this letter he prepared an answer manifestly in accordance with what he thought were his instructions from the mayor and board of fire and police commis-

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sioners. He then submitted the governor's letter and his proposed reply to his superiors, the mayor and board of fire and police commissioners. He concludes his letter to the governor with the following expression: "If you have any further suggestions or recommendations, I shall be pleased to have them, and I will, as above stated, take the matter up with the mayor and board and act upon their instructions." This is the key to the whole conduct of his office. The evidence shows that he is an intelligent and efficient officer. He knew, beyond doubt, the policy of his superiors, the mayor and the board of fire and police commissioners, and, being subject to removal by them at any moment, he seems to have believed that it was his duty to enforce the law against these houses of prostitution and unlawful sale of liquors in the manner and to the extent that they indicated. In this he seems to have succeeded as well as ought fairly to be demanded of him, and this is what he had in mind when he testified: "My understanding was, what I meant to say, was that we were enforcing the law, and had been, and would continue to the best of our ability. I didn't say that I was handicapped by anybody interfering with me." When he was asked whether there was any understanding with the members of the board of fire and police commissioners that the laws were not to be enforced with reference to the unlawful sale of liquor, he answered that there was no such understanding. The board had determined upon many restrictions upon the conduct of the inmates of these houses and upon the sale of liquors. They evidently considered that enforcing the law, and to some extent it was, and the respondent to that extent enforced the law acting under the policy and instructions of his superiors.

It was made the duty of the chief of police to keep the city attorney and prosecuting officers of the county informed of all matters that pertained to their several offices relating to the police interests of the city and of any breach of the law or ordinances. This appears from the

evidence to have been done, and prosecutions were commenced whenever so advised by the proper officers. Search warrants were issued and liquors seized. Many trials were had, and, in a few, convictions were obtained, but as a rule the prosecutions appear to have been unsuccessful. The city attorney testified that during the year 1910 there were seven or eight prosecutions for running houses for the purposes of prostitution, and about 75 or 100 prosecutions for keeping disorderly houses, and said: "I construe the 8 o'clock closing law to apply to saloon-keepers only. * * * I know of no case where the chief of police or the detectives failed, refused and neglected to aid and assist me in obtaining witnesses and bringing about a successful prosecution."

The board of fire and police commissioners adopted their policy with regard to these violations of the law complained of upon full information. The members of the police force, who continually patrolled the worst portions of the city, as well as those whose duties were in other localities, reported the conditions which they found, and these reports were before the board in its official capacity, as well as before the members of the board. The respondent kept his under officers informed as to the resolutions of the board regarding the manner of enforcing the law. In some of his communications to the captains of police we find the following language: "As you will see by a resolution passed by the Honorable Board of Fire and Police Commissioners, at its meeting last night, they further request the enforcement of the order of March 2d, in regard to closing of all cribs fronting on the streets, alleys or lanes within the 'District.' I wish to have you notify all the owners and occupants of said buildings where cribs have existed, and where they have made additional improvements, that they must cease operations at once, and any woman occupying a crib, or the places designated in the former resolution, will be arrested and brought into court after the notification given this day. You will also notify all landlords and women having name

plates on their doors that they must remove the same at once, and also all houses with glaring lights, showing names and numbers, must be removed, and they must confine themselves to an ordinary light, such as an incandescent electric light. In other words, all these glaring lights must be taken down, and, if they show a light at all, it must be of a small calibre. I wish to have this resolution of the board strictly enforced, beginning after the first notification for them to vacate."

The relator in his brief says: "In the nature of things, the entire surroundings of the respondent must be taken into consideration in passing on his good faith as an official. It would be unfair to separate and take a part of the duties or actions of the chief of police during the year 1910 and base a finding absolutely on one part of his administration. * * * The board of fire and police commissioners have the right and can remove the respondent without cause; they could remove him for a cause. * * * The house of prostitution is the pillar on which the whole system rests. If the police force would prosecute the keepers of the houses, public prostitution could not exist."

The respondent testified: "We have done everything we could. Have never purposely or wilfully neglected to carry out the directions of the board or to do what I could to suppress lawlessness and crime. We have done what we could to suppress lawlessness and crime of the character referred to in the complaint. I mean that we have carried out the orders of the board. I have been ready and willing to act upon information furnished from any source and that was sufficient, according to the requirements of the prosecuting officer, to secure complaint. We made investigations and submitted what we found to the county attorney's office and to the city prosecutor with reference to the surreptitious sale, referred to in my letter, to the extent that I had knowledge of them. We made investigations with reference to the maintaining of houses of prostitution and the selling of liquor without license.

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We have a section in the city known as the 'red-light district.' I presume it has existed for over 30 years in the northeast part of the town. It is a part of the Third ward. * * * In my judgment I would not have any right whatever to arrest any person without a warrant, except I found them in the commission of a crime. * * * As I recollect it, the ordinance directing the chief of police to suppress prostitution was repealed years ago, and it was taken away from him, giving him no jurisdiction whatever over it. I think the mayor has jurisdiction over the city to enforce the law. The chief of police acts under his direction. My construction of the law is that it is my duty to carry out the orders of the mayor. * * * All my conduct as chief of the police, with reference to the suppression of houses for selling liquor without license, was guided by the rules of the fire and police commission, laws of the city, and laws of the state. * * * I don't believe I remember of any resolution referring to this. I think the board took my letter and the governor's letter and went over them and said it was all right, my answer was all right, met with their approval, as I recollect it, no resolutions were passed."

Our statute provides: "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." Criminal code, sec. 283. This section, no doubt, applies to the chief of police of Omaha. It was, then, his duty to arrest at once any one he personally found violating the law. He was under the control of the mayor and board of fire and police commissioners, as a deputy sheriff or deputy marshal is under control of his chief. If a deputy sheriff is informed, and has ample reason to believe, that the law is being violated in a certain building, and informs the sheriff of that fact, and proposes to make an investigation and see personally whether the law is being violated, and is told by the

sheriff, his superior officer, not to do so, but to give no more attention to the matter, it may be insisted that the deputy should disregard instructions of his chief and should ascertain whether the law is being violated, and, if he found that it was, make arrests and take his chances of summary removal by his chief; but it must be conceded that the deputy, under such circumstances, might reasonably have doubts in regard to his duty, and that, if he complied with the known policy and authority of his chief, he could not be convicted of wilfully refusing to enforce the law if he failed to make further investigation. This seems to be very nearly the position in which the respondent was placed. He was appointed by the mayor and police board. He was removable by them at their pleasure. They had all of the information in regard to existing conditions that the respondent had. He knew what had been determined by his superiors to be a sufficient and proper enforcement of the law. He knew that if he violated their policy they might be expected to immediately remove him in favor of one who would obey instructions. He had not personally seen the violations of the law complained of. He knew of them by the reports of the police force, as his superiors, the mayor and board of fire and police commissioners, knew of them. The statute (sec. 64) makes it the duty of the mayor to "order, direct and enforce" the laws "through the officers of the police department." It is not so clear that the mayor could not "direct" the manner and extent of the enforcement of law against these evils, which had been long tolerated by public sentiment and high officials, as to render an under officer guilty of wilful neglect in following those directions if he acted in good faith, believing that he was doing his duty. If he in good faith believed that it was his duty to take such action in regard to the enforcement of the law as the mayor and board of fire and police commissioners prescribed for him he may have been mistaken, but it does not clearly appear that he acted wilfully.

The complaint against respondent, therefore, is not sustained, and is

DISMISSED.

REESE, C. J., concurring in the conclusion.

It may be that the conclusion arrived at in the foregoing opinion is the only one which can be justified under the facts, but I cannot agree to all that is said. From the facts detailed, it may fairly be assumed that the mayor should have been included in the order of the governor to the attorney general. It is a part of the public history of Omaha that the officers have been inexcusably derelict in the discharge of the duties imposed upon them by law, their oaths, and the necessity for the protection of property and law-abiding citizens. It must be conceded that the chief of police is in some respect subject to the control of the mayor and police board, but, as pointed out in the opinion, the fact that those officers failed and refused to discharge their sworn duty, and might have removed respondent for no other cause than that he did discharge his, ought not to furnish any justification for his failure. He knew that the law was being violated within the city by day and by night continuously. True, he perhaps did not see those violations, but his officers reported them to him, and the *law* said it was his duty to enforce its observance. That law was of higher authority than the direction of the mayor or police board. The obligation of his oath of office could not be diminished by their directions or commands. He failed to do his duty. But, if he, acting in good faith, understood and believed that the mayor, whom the statute provides shall direct him in the discharge of his duties, had the right in connection with the police commissioners to control his actions, notwithstanding the mandatory provisions of the statute, it *may* be that it ought not to be held that he had "wilfully failed or refused to enforce any law which it is his duty as such officer to enforce." Questions of this kind must be solved

consideration of the facts in each particular case. mayor and police board, admittedly the superiors chief of police, knowingly and wilfully stand in the the enforcement of the law by their subordinate , it seems clear that they should not escape, and ole of the penalties of the law inflicted upon their inates. Neither the attorney general nor the court ountable for these discriminations.

, J., dissenting.

y view of this case, the majority in their opinion eparted from three fundamental principles which me to be essential to the welfare of society: (1) 'ceeding to remove a police officer for wilful fail-enforce the law, he should not be allowed to retain e by showing that he obeyed the lawless directions superior officers, though in doing so he permitted nd notorious lawlessness and violated the solemn ents of the legislature and the instructions of the r whose duty it is as chief executive to see that rs are faithfully executed. (2) The word "wil- in a statute providing for the removal of a police "who shall wilfully fail, neglect or refuse to en- ny law which it is made his duty to enforce," has a g different from the definition of that word as the criminal law to describe a felonious act, and it mean that the conduct of the officer, to justify roval, "must be prompted by some evil intent, or alice, or at least be without sufficient grounds to that he is performing his duty." (3) A statute hing a new method of removing a public officer ful failure to enforce the law is remedial legisla- d should be liberally construed with a view to sing the mischief which made the legislation ry, and a construction which would weaken the f the statute should be avoided.

r the purpose of enforcing obedience to law in art of the state, of extending to the people gen-

erally the protection of the governor as chief executive and of making effective that provision of the constitution declaring that "the supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed," the legislature recently passed an act containing these words: "Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom." Comp. St. 1911, ch. 71, sec. 1a.

Other provisions of the act authorize the governor to direct the attorney general to institute proceedings to remove any police officer who wilfully fails, neglects or refuses to enforce any law which it is made his duty to enforce. Under power thus granted, the governor directed the attorney general to bring this suit against respondent as chief of police to remove him from office for neglecting to enforce the laws in the city of Omaha. A statute of this state makes it the duty of a chief of police to "arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." Criminal code, sec. 283. Under the charter of the city of Omaha, additional power is conferred upon the chief of police in the following language:

"He shall have, in the discharge of his proper duties, like powers, and be subject to like responsibilities, as sheriffs in similar cases.

"Each policeman shall give a bond conditioned as provided in this act, and shall have the same powers as constables in arresting all offenders against the laws of the state, and may arrest all offenders against the ordinances of the city with or without a warrant. In discharge of their duties as policemen they shall be subject to the immediate orders of the chief of police." Comp. St. 1911, ch. 12a, secs. 70, 71.

Referring to the laws forbidding gambling, prostitution and illegal sales of intoxicating liquors, the majority find: "The evidence abundantly shows that in all these respects the law has been openly, notoriously and continuously violated in the city of Omaha. According to this evidence there is and has been for more than 30 years continuously a large district embracing several blocks upon some of the principal streets in that city notoriously known as the 'red-light district,' in which prostitution and the illegal sale of intoxicating liquors, and in many cases gambling and other vices, have been and are so openly and brazenly practiced that all citizens of Omaha, and all citizens of the state, whose attention may have been called to the matter must be aware of existing conditions."

The conditions thus described have not only been known to respondent, but reports showing the facts are on file in the department of which he is the chief. The machinery and power of the police department of a great city are in his hands. His official connection with the police department extends over many years. It would be an affront to his intelligence to intimate that he is ignorant of the lawlessness proved. That he intentionally refused to enforce the law, knowing the lawless conditions described, is fully established by the evidence. I do not concur in the opinion of the majority that he is not answerable in this action because, in permitting open violation of the law, he is carrying out the policy of the police commissioners and the mayor who appointed him. He is the officer of the city. In the city's connection with the state, he is the state's officer. His obligation, like that of other officers, is to uphold the constitution and laws. Orderly society is entitled to his protection within his jurisdiction. He is not the employee of his superior officers. His power comes from the state and his compensation from the city, and not from his superiors who give protection to crime and vice. As an officer he owes a duty to the public. Only proper and lawful instructions from the mayor and police commissioners are entitled to

Donahue.

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society have stronger claims upon his loyalty. His duty
to those who should direct his course aright is within the
law, and he has no authority to follow them into open
lawlessness, where the dividing line is not in doubt.

Like all other officers and individuals, respondent
should respect the provisions of the constitution. That
instrument declares that the governor of the state "shall
take care that the laws be faithfully executed." Const.
art. V, sec. 6. This duty extends to every part of the
state. When the governor lawfully directs respondent
to enforce a particular statute, his orders should not be
annulled by a lawless policy adopted by persons tempo-

rarily acting as mayor and the governor called to the attention instances of violations of the enforcement of its provisions. that he would take the matter to the board and act upon their instructions. unlawful conditions described by the majority were allowed to continue in spite of official oaths to enforce the demands of the chief executive officer that the laws be faithfully enforced. enforcement demanded by the chief of police than the lawless assumption as officers to adopt a lawlessness and protects lawbreakers. resign any time or he may be relieved by statute. The record shows having been warned by the chief of law, wilfully and deliberately carrying out the policy which resulted in being found by the majority to exist for reasons for dismissing the action.

2. I cannot agree to the motion "to wilfully fail, neglect or refuse to apply to the statutory duty other than oversight or carelessness" that "it must be prompted by malice, or at least be without belief that he is performing his duty."

There is a vast difference between the words "wilful" and "wilfully," and the same words, as used in the public officers and providing to perform those duties. The distinction made by courts and text-writers of familiar words used in the criminal acts made punishable at common law in some measure, to protect in

cution block of bloody rulers or to prevent the punishment of men who had committed no offense. This meaning should not be borrowed from the criminal law of the odious past and inserted by the court in a recent statute imposing upon public officers the duty to enforce legislative enactments. It should not be used to justify a guilty officer in permitting open and notorious lawlessness. The distinction mentioned led the supreme court of Michigan to observe: "The word 'wilfully,' when used to denote the intent with which an act is done, is a word which is susceptible of different significations, depending upon the context in which it is used." *Highway Commissioners v. Ely*, 54 Mich. 173, 180.

In *People v. Herlihy*, 72 N. Y. Supp. 389, the captain of police in command of the Twelfth precinct of New York City was indicted for "wilfully omitting to perform a duty enjoined upon him by law." The conditions in his precinct resemble those in Omaha, as described in the opinion of the majority. In New York the captain was charged by law "with the duty of observing and inspecting houses of ill fame, repressing all unlawful and disorderly conduct and practices therein, enforcing the law and preventing violations thereof." The captain demurred to these facts: "(1) That he was captain of police; (2) that the law enjoined upon him the duty of carefully inspecting all houses of ill fame and houses where common prostitutes resort or reside, to repress and restrain all unlawful or disorderly practices therein, and to enforce and prevent all violations of law; (3) that during a certain period of time, and while he was in command of the Twelfth precinct, there were 109 houses of ill fame therein kept and maintained openly and notoriously; and (4) that he wilfully neglected his duty by permitting such violations of law to continue, and by omitting to take proper and effective means for their repression and prevention." In part, the court in the case last cited said: "Can it be seriously contended that a captain of police is not a public officer, or that he is not

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A statute of Kentucky required corporations to report to the state auditor for the purposes of taxation, and for "wilful failure to make such report" the sections containing those provisions the court of Kentucky decided: "The word 'wilful' in those sections, does not mean a failure to refuse to make the report, or a failure to defraud the state, or evading or neglecting the collection of taxes. The term, as used in those sections, means a voluntary act of the defendant, without coercion, or, in other words, a failure to report or not to report." *Louisville & Nashville Co. v. Commonwealth*, 104 Ky. 726.

In *People v. Brooks*, 1 Denio (N. 704, a justice of the peace was called "neglect of duty" in refusing to require him to take an affidavit. In *People v. Brooks*, the court, in holding that the justice was not guilty of the statutory term, the court

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tatute is, that the neglect of duty his neglect was of that character.

was asked of him, and he knew was nothing like surprise, inadvision on his part. He refused to do as he intended so to refuse. This of duty, for 'every intentional act counts.' *Commonwealth v. Green*, 1

ky required every superintendent to submit his accounts before August 1, and punishment for "wilful failure" to do so. *Commonwealth v. Green*, 76 S. W. (Ky.) 184, it was held that a superintendent to make his settlement as required was a 'wilful failure,' notwithstanding his excuse that he had caused certain receipts for moneys to be made, and it was his purpose to make as he could obtain duplicates."

The act empowered the superintendent to remove any school officer who is guilty of such failure. In construing that *Draper*, 63 Hun (N. Y.) 389, the 'Wilful' in the statute giving the ground for removal was equivalent to 'in-

that the word "wilfully," as used in the statute, means a wilful neglect of duties on a public officer and proper violation of those duties, does not support the opinion of the majority, "some negligence, or at least be without sufficient knowledge that he is performing his duty." *State v. Donahue*, 37 Neb. 96, cited to sustain the removal. The court was trying an impeachment—'in office'—a technical term used in the statute. Its meaning is not the same as the case—'wilfully fail, neglect or refuse to perform duty.' The case is not in point.

In the opinion of the majority it is said that "the chief of police is appointed by the board and removable at its pleasure." This means that the board may remove him from office without notice or hearing, with all the attending consequences. In *State v. Smith*, 35 Neb. 13, this court said: "Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing."

It is thus established that the board of fire and police commissioners, without notice or hearing, may remove respondent and deprive him of all hope of a pension, if he refuses to follow their policy of permitting open and notorious lawlessness, and I have been unable to follow the course through which the power of removal for wilful failure to enforce the law, when extended to this court, became suddenly of so little consequence to society, and of such magnitude to the individual person who as chief of police knowingly permits open and notorious lawlessness, that it is now "highly penal," requiring, as a condition of its exercise, evidence "clear and satisfactory," though it is declared in a long line of earlier decisions that a mere preponderance of the evidence establishes any issue in a civil case. This court was once of a different opinion. In *State v. Sheldon*, 10 Neb. 452, it is shown that a county treasurer was removable for the statutory ground of "wilful neglect of duty." In the opinion it is said: "The county treasurer, having failed to account for the moneys in his hands properly chargeable against him as treasurer, is guilty of wilful neglect of duty, and may be removed from office; and the fact that the moneys were stolen is no legal justification for the failure to account for them." This is in harmony with the following doctrine announced by Wharton: "A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he do not, and through mistake of law or of

fact be guilty of negligence, he commits a penal offense. This seems hard law, but it is essential to the safety of the state." 2 Wharton, Criminal Law (10th ed.) sec. 1582.

3. The statute providing for the removal of officers who fail to perform their duty is a remedial statute. Sedgwick in his work on Statutory Construction says: "Remedial acts are those made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause." Sedgwick, Statutory Construction (2 ed.) p. 32. The same author also adopts the following rule of Dwarris: "The words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy." Sedgwick, Statutory Construction (2d ed.) p. 309. Both of the foregoing rules were adopted by this court in its early history and were followed until the majority opinion in this case was written. *Buckmaster v. McElroy*, 20 Neb. 557. The statute making additional provisions for the removal of police officers does not deal with a new subject. It was intended as an additional civil remedy. It should be construed to give effect to its provisions with a view to correcting the mischief at which the legislation is directed. The construction of the majority has the opposite effect. It weakens the statute, and in many cases will make it inoperative. In my judgment the dismissal cannot be justified.

LETTON, J., concurs in the dissent.

HAMER, J., dissenting in part and concurring in part.

I am compelled, in part, to dissent from the opinion of the majority touching the question of jurisdiction to hear and determine this case. As this court has assumed jurisdiction, and has heard the case, and has reached a conclusion, I will say that I concur in the result reached, but I do not concur in the reasoning nor in the conclusion, except that I agree to the result. The respondent was

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charged in this court in an information in *quo warranto*, as chief of police of the city of Omaha, with wilfully and unlawfully failing, neglecting and refusing to enforce the laws of the state of Nebraska "which it is made his duty to enforce," and the ordinances of the city of Omaha. After this general allegation there is in the complaint the charge that since said Donahue has held his office there have been a large number of persons, principally inmates and keepers of houses of prostitution and assignation, who have unlawfully sold "intoxicating liquors and are now unlawfully selling intoxicating liquors in said city of Omaha without having first procured a license to sell the same; all of which facts were well known to said John J. Donahue." It is then charged that said Donahue "unlawfully and wilfully" failed, neglected and refused to cause the arrest and prosecution of the guilty persons. A large number of places are mentioned in the information where it is alleged intoxicating liquors were unlawfully sold, giving dates of such sales, and the names of the proprietors and occupants of the houses. In this connection it is alleged that the rules of the board of fire and police commissioners for the said city of Omaha for the government of the police force enjoining said duties upon the said Donahue are: "It shall be the duty of the chief of police to see that the laws of the state, the ordinances of the city, and the rules and regulations of the board of fire and police commissioners are duly enforced throughout the department, and he shall keep the city attorney and prosecuting officers of the county informed of all matters that pertain to their several offices relating to the police interests of the city or of any breach of the law or ordinances. * * * He will be diligent in the enforcement of the laws relating to lotteries, lottery policies, and the sale of liquor and gambling of all kinds." It will be noticed that the complaint fails to allege that he neglected to keep the city attorney and prosecuting officers of the county informed of matters pertaining to their offices relating to the police interests of the city or of any breach

of the law or ordinances. It is not alleged specifically, as it would seem that it should be in any sort of criminal case, what particular law he "refused to enforce." It is said that he "neglected and refused to enforce the laws of the state of Nebraska, which it is made his duty to enforce," but the particular law that he so neglected and refused to enforce is not seemingly set out anywhere. It is only in a general way that any sort of charge is shadowed forth against him. It would seem that he was put on trial "on general principles," and without a specific charge, such as is ordinarily made under the rules of the criminal law.

The law under which this proceeding was brought is chapter 78, laws 1907, and reads: "Section 1. Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom. Section 2. The attorney general of the state, when directed by the governor, shall institute and prosecute *quo warranto* proceedings in the supreme court against any such county attorney or prosecuting officer, sheriff, police judge, police officer, or police commissioner, mayor or other officer, and if the court shall find that such officer has wilfully failed or refused to enforce any law which it is his duty as such officer to enforce, then the court shall render judgment of ouster against such officer and the office shall thereby become vacant." •

It will be noticed that there is an absence in the charge of any statement telling *how he refused* "to enforce any law." The impossible nature of the thing which the statute seems to contemplate that he may be compelled to perform, provided it is so construed, is seemingly a bar to any proceeding against the respondent. There is no allegation that he refused to communicate what he knew to the county attorney or to the deputy county attorney or the police judge or the mayor concerning any particular vio-

lation of law. All persons who know anything about the matter must realize that it is an impossible thing for a police officer himself to enforce the law. A police officer does not draw up complaints. A police officer does not examine witnesses nor make speeches before the police judge or before any magistrate or in the district court before the jury in criminal cases. A police officer is just a man to assist his superior officers in maintaining order. He is not a lawyer, neither is he a judge. In the enforcement of the law it is necessary that these officers participate. The chief of police is simply the arm of the law; he is not the prosecutor. He never was intended as a prosecutor. He is not supposed to have any legal knowledge or any duty to perform beyond that of arresting those who are charged with violating the law, or who are seen by him to violate the law. He is not a county attorney or a deputy county attorney or a sheriff or a police judge or a magistrate of any kind. It is peculiar in this case that the executive arm of the mayor and board of fire and police commissioners should be picked upon as the person to be punished, when the people whose real duty it was to maintain prosecutions, if there was a violation of law, were not charged with any sort of dereliction. Why was not a complaint made against the city attorney and the county attorney and the police judge and the justices of the peace and the mayor and the board of fire and police commissioners?

The purpose of the act under which this prosecution is brought would seem to be to thrust upon this court the burden of so disciplining the officers of cities that they will prosecute cases for misdemeanors which would not otherwise be prosecuted. The thing attempted to be done suggests mistrust of the morals of the people in the cities of the state and unwillingness upon the part of the legislature to trust the officers of our cities elected by the people with the administration of their own affairs and the punishment of their offenders. The thing sought to be done is not in accord with the love of self-government in city

communities or elsewhere. Communities desire to govern themselves, and if they can do so by a judge and jury of their own or by a board of their own they will be better satisfied. No community likes to be governed by some other community. No man wants to be tried by a foreign tribunal, however innocent he may be. The reason is that the foreign tribunal may not possibly know the things which are of advantage to the defendant. *Olive v. State*, 11 Neb. 1. If the case brought against Donahue could be tried before a Douglas county judge and jury or a Douglas county body of men of the average standard of morality, Donahue would have no cause of complaint. But if Donahue can be tried by one man belonging to one particular type, and not by a body of men, and this type of man, however unobjectionable in his private life and however upright, may bring in a finding as referee that shall be adopted instead of adopting the view of a judge and jury or of a board belonging to Douglas county, then Donahue is likely to be in most imminent danger. The man selected as referee is only *one* man, and, however upright he may be, there is danger that he will be influenced by special conditions that surround him or by particular individuals, and that his finding will not be as fair and as unbiased as the finding of a jury or board composed of a number of men. This method of trial would seem to be clearly objectionable if there is any other method of trial that has been provided under the constitution and the law. This man is practically on trial for an alleged criminal offense before a referee. He has been deprived of a trial by a judge and jury of Douglas county. He has been deprived of a trial by the mayor and board of fire and police commissioners who appointed him. He has been tried by a referee, when the thing brought against him is more serious and of greater magnitude to him than if he might be sent to the penitentiary. This trial, to the writer, violates every sense of propriety.

Section 58, ch. 12a, Comp. St. 1909, provides: "In each city of the metropolitan class, there shall be a board of

fire and police commissioners to consist of the mayor, who shall be *ex officio* chairman of the board, and four electors of the city who shall be elected by the qualified electors of the city by a plurality of votes at the city election provided for in this act on the first Tuesday in May, 1909, and every three years thereafter."

It is provided in section 61: "The board of fire and police commissioners shall have the power and it shall be the duty of said board to appoint a chief of police, and such other officers and policemen * * * as may be necessary for the proper protection and efficient policing of the city, and as may be necessary to protect citizens and property, and maintain peace and good order."

Section 62 of the same act provides that no member or officer of the police or fire department shall be discharged for political reasons, and also provides that before such policeman or fireman can be discharged charges must be filed against him before the board of fire and police commissioners, and a hearing had, and that he shall be given an opportunity to defend himself.

Section 67 of the same act provides: "The chief of police shall have the supervision and control of the police force of the city, subject to the orders of the mayor and board of fire and police commissioners."

Section 69 provides: "He shall be subject to the orders of the mayor in the suppression of riot and tumultuous disturbances and breaches of the peace."

It will be seen that the chief of police is appointed by the mayor and the board of fire and police commissioners. He is put under their direction and control by the statute.

Sections 91, 92 and 93 provide for the trial of any city officer and his discharge because of malfeasance in office. It will therefore be seen that there is jurisdiction to try the respondent before the board which appointed him or before a judge of the district court. For these reasons, there was no necessity of this trial in this court.

The mayor and board of fire and police commissioners had power to remove him if he refused to do their bidding.

To him their power meant official life or official death. With the chief of police his obedience to the mayor and the board of fire and police commissioners was a matter of self-preservation. They had power to discharge him at once, and the governor was absolutely without power to protect him. (1) It was a matter of duty to his superiors. (2) If he went contrary to the orders of his superiors they would at once put him out of office and put another in his place. That meant disgrace and dishonor. (3) It is not shown that he saw this misdemeanor contained in the complaint committed, or that he refused to file a complaint in any particular case charging a violation of the law. (4) Nor is it shown that his superiors at any time requested him to file a complaint which he refused to file.

It is my contention: (1) That *quo warranto* is not adapted to the trial of the right to hold an office where the person in possession has been unquestionably appointed or elected in a case where an office has been created and the appointing or electing power has the lawful right to appoint or elect. My contention is that *quo warranto* is not adapted to the trial of a case which is attempted to be made criminal in its nature.

If my contention has been properly overruled, and it is still held that *quo warranto* furnishes the proper remedy to try a case which is criminal in its nature, then I say that the rules to be followed throughout are the rules which apply in a criminal case, and the respondent cannot be found guilty unless it appears by the rules, as they would be ordinarily applied in a criminal case, that he wilfully, that is, without reason or justification, refused to comply with the order of the governor and to prosecute these cases.

(2) Donahue cannot be guilty of a wilful disregard of the order made by the governor, if he obeyed the orders of his immediate superiors, because they are directly in authority over him under the provisions of the statute. His immediate superiors were the mayor and the board

of fire and police commissioners. If this be not true, then there is no such thing as discipline.

While the remedy of *quo warranto* may be used to try title to an office, it may well be doubted whether it can be used to punish one who has committed some act alleged to be forbidden by law, and by reason of which his removal from office is sought to be accomplished. The machinery to try title to an office is not adapted to trying one who is found holding an office to which he has unquestionably been appointed or elected and whose term has not yet expired.

It must be admitted that the offense charged is highly penal in its nature for the reason that the punishment sought to be inflicted is of the severest character—loss of office, loss of honor accompanied by disgrace, denial of preferment and incidentally loss of pension earned by the long continued pursuit of a career in which there was the perpetual menace of injury and death by criminals and vicious persons. While the respondent may have found himself unable by himself to punish all the violators of law to be found in the metropolis of the state, it is seemingly undeniable that for the long period of nearly 20 years he faithfully and vigilantly devoted himself to the protection of the better class of peace-loving citizens of Omaha, and guarded them against theft, arson, violence and murder as best he could.

He is entitled in any event to a trial according to the forms of the law guaranteed by the constitution and the criminal code. I do not think that punishment almost, or quite, as severe as if he were to be sent to the penitentiary should be inflicted by a form or method of trial intended merely to determine the title of office as between contestants for official position, or to oust one who had never been qualified to enter upon an office wrongfully usurped and held. I do not think this court should be a court of original jurisdiction to hear and determine cases which are in their nature criminal. I am especially opposed to the trial of a case which is practically a criminal

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Feeding Co. v. People, 156

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Roe, 26 N. J. Law, 215.
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ORATOR, APPELLANT, V. SOREN
 N, APPELLEE.

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PAYMENT: REVIEW. If a judgment
 e the judgment in the name of the
 d judgment plaintiff, answers that
 and satisfied, and, without objection
 ined is tried by the parties, it will
 ourt upon appeal that, the judgment
 ver constituted no defense.

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2. **Garnishment: EFFECT OF PAYMENT BY GARNISHEE.** If a judgment debtor, as garnishee in a suit against the owner of the judgment, is ordered to pay the amount of the judgment into court to be applied upon the claim of the plaintiff in attachment, and afterwards a judgment is entered in favor of the attachment creditor, and the original judgment debtor is again ordered upon garnishment after judgment to make such payment into court, and in good faith makes payment pursuant to said respective orders, such payment will satisfy the original judgment, although it should afterwards appear that the court was without jurisdiction to enter a personal judgment in favor of the attachment creditor and against the owner of the original judgment.
3. **Attorney and Client: LIEN: PAYMENT: BURDEN OF PROOF.** If a judgment debtor pays an attorney the amount of his claim of lien upon the judgment without the knowledge and consent of the owner of the judgment, and knowing that the attorney no longer represents such owner, the burden is upon the judgment debtor, in an action between himself and the owner of the judgment, to prove the validity of the lien and that the attorney was entitled to the money so paid thereon.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Leavitt & Hotz, for appellant.

J. O. Detweiler, contra.

SEDGWICK, J.

About 20 years ago Francis E. Reisdorph began an action in the district court for Douglas county against this defendant, Soren T. Peterson, and afterwards recovered a judgment therein. In July, 1902, Mr. Reisdorph died, and an order was made by the probate court appointing the Continental Trust Company as administrator of the estate. That company began proceedings in the district court for Douglas county to revive the judgment in the name of the administrator. Upon appeal to this court the proceedings were dismissed. *Continental Trust Co. v. Peterson*, 76 Neb. 411. Afterwards this plaintiff, Ellery R. Hume, was appointed administrator of

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Hume v. Peterson.

began these proceedings in the district court of Douglas county to revive the judgment of the administrator. Mr. Peterson answered the complaint and alleged that the judgment had been fully satisfied. The court found that the principal part of the judgment had been paid, and that the balance due thereon was \$1,500 with interest from the 4th day of October, 1909, taxed the costs of the proceedings against the defendant. From this finding and judgment both parties have appealed to this court.

One David Van Etten, who was then an attorney at law practicing in Douglas county, represented Mr. Reisdorph as such attorney, in procuring the said judgment. Afterwards, Mr. Reisdorph having become a nonresident of the state, and the said Van Etten having filed an attorney's liens against the said judgment, which remained unsatisfied, the said Van Etten began an action in the district court for Douglas county against Reisdorph to recover his fees represented in the said judgment and other alleged claims. In this action he filed an affidavit for attachment, and procured an order of attachment and garnishment process to be issued against the defendant as a debtor of Reisdorph upon the said judgment. Such proceedings were afterwards had in this court so that on the 18th of November, 1897, an order of attachment was entered against this defendant as garnishee to pay into court the "sum of \$1,500, except \$202.34 paid in 1896, with interest from February 6, 1893, at 7 per cent per annum."

A judgment was entered in favor of the plaintiff in the case of Van Etten v. Reisdorph on December 16, 1897, for \$1,515.38, and in 1902, after the death of Reisdorph, Van Etten filed an affidavit and obtained an order of garnishment against this defendant, and on November 18, 1902, the court entered an order that this defendant "as garnishee herein after judgment pay into court the sum of \$2,060.77, and \$50 probable costs, for the benefit of David Van Etten, as plaintiff and judgment creditor, and the

Hume v. Peterson.

when paid to be credited in the case of Reisdorph v. Peterson." Afterwards, in August, 1903, Van Etten filed a receipt acknowledging payment by this defendant of \$2,185.10 in full of his judgment. The receipt recited that the costs be paid by this defendant, and the defendant presented receipt for costs paid by him. This payment by the defendant Peterson was allowed by the court as payment upon the principal judgment, and this raises the principal question presented upon this appeal.

1. The first objection is that, the judgment not being dormant, and the action being to revive in the name of the administrator, the court could not in such proceeding consider the defense of payment and satisfaction of the judgment. Section 472 of the code provides: "If either or both the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment." We cannot find from the abstract that any objection was made to the answer of this defendant to the conditional order of revivor; it appears rather that the parties went to trial upon the issues so presented, and after this extended litigation they ought to abide by the issues which they have presented which have been fully tried and determined by the court.

2. Some objections are made to the preliminary proceedings in obtaining the attachment and garnishment in the suit of Van Etten v. Reisdorph, but these objections are not much discussed, and, so far as we have observed from the abstract, the petition, the affidavit and the service by publication were sufficiently regular to give the court jurisdiction of the garnishee.

It is objected that the judgment obtained by Mr. Van Etten against Reisdorph is void for want of service upon Reisdorph, it being insisted that Mr. Reisdorph as defendant in that action made no appearance therein. We find in the abstract a paper purporting to be the answer of Mr. Reisdorph which was filed in that action upon the

proper answer day therein. It is objected that this is a forgery, and there is evidence in the abstract strongly tending to show that, while the signature upon this paper is the signature of Mr. Reisdorph, it was placed by him in an unusual position upon a blank sheet of note paper upon which was afterwards written over his signature what purports to be a general denial in the action then pending. There is, however, no explanation in the record as to how Mr. Reisdorph's signature to this paper was obtained or in any way explaining the peculiar circumstances of the filing of this answer. We think, however, that this objection does not necessarily affect the merits of this controversy, nor is it material that no execution was issued upon the judgment obtained by Van Etten against Mr. Reisdorph until after the death of the latter, nor that subsequent garnishment proceedings upon the judgment of Van Etten v. Reisdorph were instituted after Mr. Reisdorph's death. It appears that, by the original proceedings in attachment and garnishment which were had in 1897, the district court obtained jurisdiction of the subject matter of the indebtedness of this defendant upon the judgment in favor of Reisdorph, and that, in pursuance of those proceedings, this defendant was ordered to pay the amount of that judgment into court to be applied upon Mr. Van Etten's claim. The court having jurisdiction of the subject matter, this order, when collaterally attacked, sufficiently protected the defendant in paying the money pursuant thereto, although such payment was for so long time delayed. After Mr. Reisdorph had placed his signature upon the paper which was afterwards filed as his answer, and upon which the court was led to rely as his answer in the case, he still neglected for several years to give any further attention to the matter, and his administrator is now asking for redress, not against the parties who may have deceived and wronged him, but against this defendant who has made payment upon the original judgment relying upon the record and upon the orders of the court. Of course, if this alleged

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answer is a forgery and was never authorized, directly or indirectly, by Mr. Reisdorph, the judgment, so far as it attempted to fix the liability of Mr. Reisdorph in favor of Van Etten, would be without jurisdiction; but this does not affect the jurisdiction of the subject matter of the action, and does not invalidate the order of the court made at the institution of the attachment proceedings, which were never questioned by Mr. Reisdorph, although made more than five years before his death. We think the court did right in allowing this payment by Mr. Peterson as a payment upon the original judgment.

3. The defendant upon his appeal insists that he should have been allowed upon this judgment costs which he paid in the original garnishment proceedings; and certain claims of Van Etten which he paid that were not included in the order of the court in the garnishment proceedings. He insists that these items were liens upon the original judgment in favor of Van Etten, as Reisdorph's attorney; but the evidence in the abstract, so far as we have been able to ascertain, does not support these claims. Van Etten included his attorney's liens in his attachment proceedings, and the evidence does not establish that he had other liens upon the judgment that were not allowed and satisfied by those proceedings. The evidence, as shown by the abstract, is somewhat disconnected and unsatisfactory, and we cannot ascertain therefrom that the findings of the district court were so clearly wrong as to require a reversal.

The judgment of the district court is

AFFIRMED.

WILLIAM A. BECKER V. STATE OF NEBRASKA.

FILED APRIL 20, 1912. No. 17,448.

1. **Continuance:** DISCRETION OF COURT. It must necessarily be left to the sound discretion of the trial court to determine under all of

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the circumstances of a particular case whether a continuance or delay of the trial is required in the interests of justice. The ruling of the trial court thereon will not be held prejudicially erroneous, unless an abuse of discretion is clearly shown.

2. ———: ———. The defendant, several months before the trial employed a firm of two attorneys for his defense, the junior of whom acted for him in the preliminary examination. At the time set for the trial the senior member of the firm, who was expected by both of the said attorneys to take charge of the defense, was engaged in the trial of a case in another court and so prevented from being present at this trial. The court appointed an experienced attorney to aid the junior counsel in the defense and refused a continuance or further delay of the trial. *Held* no abuse of discretion on the part of the trial court requiring a reversal of the judgment.
3. **Criminal Law: RECEIVING STOLEN PROPERTY: EVIDENCE.** In a trial for receiving stolen property, after evidence is received tending to prove that the property described in the information was stolen at or about the time alleged, and that the defendant had received the same, it is competent to prove, as tending to show guilty knowledge, that a short time prior to that transaction the same person had stolen property of a similar character, which had been received by the defendant and afterwards sold by the thief, and that the defendant had also received and cashed a check which had been delivered to the thief in payment for the same.
4. ———: ———: ———. In such case, if the stolen property is sold by the thief, and a check payable to defendant is taken therefor, and the money paid to the defendant thereon, the check is competent in evidence as a part of the transaction tending to show knowledge on the part of the defendant that the property described in the information was stolen property when received by him.
5. ———: ———: ———. It is not reversible error to receive in evidence indorsements on a check, not identified or explained, when the check itself is properly received, and the indorsements are of such a character as in no way to affect the parties to the suit or the subject matter of the controversy.
6. ———: **INSTRUCTIONS.** The words in an instruction, "the fact that he (the defendant) has been contradicted by other witnesses, if he has," are not erroneous, as implying that he has in fact been so contradicted.
7. ———: ———: **CONFESSIONS: QUESTION FOR JURY.** It is not error to refuse an instruction containing the statement that "the law

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does not favor confessions." When confessions of guilt by the defendant are properly admitted in evidence, it is generally for the jury to determine what force and effect shall be given such confessions under the circumstances of the case.

ERROR to the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Byron Clark and William A. Robertson, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

SEDGWICK, J.

The defendant was convicted in the district court for Cass county of receiving stolen property. He has brought the case here upon petition in error, and urges three several objections against the regularity of the conviction.

1. The defendant was first arrested and had his preliminary examination in December, 1910. The information was filed in the district court on the 12th day of January, 1911. On the 10th day of June, 1911, the court being in session, he filed a motion for a continuance to the next term of court. This motion was overruled, and no serious complaint is made of this ruling. On the 12th day of June a motion was made to postpone the trial "until after the 17th day of June, 1911, for the reason that Byron Clark, attorney in charge of said case for defendant, was engaged in the trial of a cause in the federal court at Lincoln." From the affidavit filed in support of this motion it appears that the said Byron Clark and one William A. Robertson were partners in the practice of law, Mr. Clark residing in Lincoln and Mr. Robertson in Plattsmouth, and that this firm had been employed by the defendant at the time of the preliminary examination, and that it was expected by the members of the firm that Byron Clark would be present at the trial of the case and "have charge of said trial for the defendant." It

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Robertson had acted as counsel for preliminary examination, and that this motion Mr. Clark had not per-he matter. Upon this motion and pointed a member of the bar to as- the trial of the cause, and over- a continuance and set the cause for of June. Other matters are stated is the substance of the proceedings act.

ntinuance are addressed to the sound l court, and no abuse of discretion ord. The case is within the prin- his court in *Cate v. State*, 80 Neb. *State*. 86 Neb. 539.

ion insisted upon in the brief ap- ourt erred in allowing evidence of a a similar nature to the one involved the defendant. One Crawford had dling wheat, and was at the time of ntence in the penitentiary for that as a witness by the state, and tes- charged in the information against s, Crawford, stole a load of wheat, ropst; that he took the stolen wheat e defendant in the night time, and, f the defendant, the wheat was de- ant's bin preparatory to disposing ness was then allowed to testify that ransaction, upon an understanding e had stolen another load of wheat the defendant's premises, using the wagon for that purpose, and had to an understanding with the de- nt, receiving a check therefor in the , and had delivered the check to the ed by him, and had afterwards re- dant one-half of the proceeds of the

check. This check was identified by the witness who drew it and by the banker who cashed it. The check was cashed by the banker that the check was for the defendant and the money for the same was paid to the defendant. This check was then received by the defendant.

It is contended that all of this evidence is incompetent to prove the theft of the first load of wheat. It is also contended that the check itself was also incompetent to prove the theft of the wheat. The jury upon this point was instructed that the evidence offered was competent for the purpose of tending to show a prior theft of wheat by the defendant, and that the check for such wheat, purporting to be for the defendant, is admitted in evidence for the purpose of showing whether or not the defendant had knowledge that the wheat described was stolen. You will consider this evidence along with all the other evidence in the case in determining whether or not the defendant had knowledge that the wheat was stolen property." We think that this instruction was properly received for the purpose of the trial, and that the rights of the defendant were fully guarded by the court.

The check was offered in evidence with the original writing, stamps and indorsements. The defendant objected that these indorsements were incompetent to identify and prove the theft. The court overruled the objection. The indorsements, being in the abstract, were immaterial, except to show that the defendant, and the defendant, and the defendant, and the defendant, admitted that he indorsed the check. The court held that these indorsements were erroneously admitted, but that it was without prejudice to the defendant to object to them.

3. The instruction given by the court that the money of the defendant himself is competent evidence for the reason that said instruction amounts to a statement to the jury that the defendant had been a witness. This objection is not valid. The court held that he has been contradicted by the evidence, and that the language used, and the

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construction. As no other objection is made to this instruction it is not thought necessary to discuss it further.

4. The defendant requested the court to give the jury an instruction containing these words: "The law does not favor confessions, and you must scrutinize all evidence of alleged confessions closely." The court refused to give this instruction, and it is now insisted that this was error. The weight that should be given by a jury to confessions of facts made by a defendant depends largely upon the circumstances under which such confessions are made, and it is not proper to tell the jury that the law does not favor confessions. When evidence is properly admitted tending to show confessions of guilt made by the defendant, it is for the jury to determine what force and weight should be given to such confessions. This offered instruction would invade the province of the jury and was rightly refused. *Dodge v. People*, 4 Neb. 220.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. SCHOOL DISTRICT OF THE CITY OF LINCOLN,
APPELLEE, V. SILAS R. BARTON, AUDITOR, APPELLANT.

FILED APRIL 20, 1912. No. 17,487.

1. **Statutes: AMENDMENT: CONSTITUTIONAL PROVISION.** "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Const., art. III, sec. 11. This provision makes inviolable the rule governing legislative bodies, that no proposed subject different from that under consideration shall be admitted under color of amendment. *Miller v. Hurford*, 11 Neb. 377.
2. ———: ———: ———. The provision of the constitution is directed against surreptitious legislation of which the members of the legislature and the public have no notice.
3. ———: ———: ———: **TITLE OF ACT.** Where the title to a bill is to amend an existing act, or a section thereof, no amendment

is permissible which is not ger
the original act or section indic

4. ———: ———: ———: ———.

cate the legislation embraced in
ments of the clause of the const
mandatory, they are not to be er
cripple legislation. The title to
is not essential that it specify
statute.

5. ———: ———: VALIDITY OF ACT.

1881, and in 1883, under an act
tion in said statute was amend
with a proper title, said section
contained matter clearly within
and in 1897 said section as amend
act with a proper title and con
the title of the original bill, and
in the section as amended in 18
amended was again amended, unde
touching the subject matter conta
said section as amended in 1901 w
with a proper title and touching
said section at that time, and l
amended, under an act with a pr
ject matter in said section at the
tion as it stood when last amend

6. **Schools and School Districts:** Bo
held that section 24, subd. XIV,
ized the issue and registration of
and that the same were proper
registration.

APPEAL from the district cou
WILLARD E. STEWART, JUDGE.

Grant G. Martin, Attorney G

Frank E. Bishop, contra.

E. F. Pettis, amicus curiæ.,

HAMER, J.

This is an appeal by the au

from the judgment of the district court for Lancaster county directing that a mandamus issue to Silas R. Barton, as auditor of public accounts of the state of Nebraska, compelling him to register the school bonds of the school district of the city of Lincoln, amounting to \$350,000. They were issued under section 24, subd. XIV, ch. 79, Comp. St. 1911. The attorney general urges this court to hold that said section 24 is unconstitutional and void for the reason that as it was at first enacted it was a limitation upon the amount of the aggregate annual tax which might be levied upon the property of the school district; that the amendatory act of 1893, providing for calling an election and voting bonds, was not germane to the subject contained in the original section, and that the act has not since been properly amended; that the amendatory acts did not contain sections 2, 3, 4 and 5, which are thereby sought to be amended, and that the same were not repealed by said amendatory acts.

It is claimed that the propositions submitted were: (1) The issuance of bonds for a high school building; (2) the question as to whether said high school building should be located on its present site; (3) the question as to whether the said high school building should be located on ground commonly known as the "Davenport tract;" (4) the question as to whether or not one grade high school building should be located in a certain place; and (5) the question as to whether an annex to another grade school building should be located at a certain place.

It is also claimed that the election was illegal and void because the school district takes in territory beyond the limits of the city and the school election was held at the time of the regular city election, and that no provision was made in the territory outside of the city limits within the school district where the voters of said outside territory might appear and cast their votes, and that the only places where the voters might appear and cast their ballots at said school election was in the city of Lincoln at the usual and regular voting places for the said election.

It is also claimed that the election was held because the school authorities published the election in a weekly paper called the *Nebraska*, and also put one insertion in each of the *Lincoln Daily Star* and the *Nebraska*, and did not publish said notice of election for at least 20 days.

The first contention is that section 79, Comp. St. 1911, is not valid and this is most strenuously insisted upon.

It is claimed by the attorney general who appears as *amicus curiæ*, that the act of 1893 sought to amend section 24, article V, 1881, it entirely ignored so much of the constitution, as required (1) that it contain more than one subject, and (2) that it be clearly expressed in its title. (2) It was amended unless the new act contained the same provisions so amended, and the section shall be repealed." Mr. Pettis, as counsel for the defendant, made the following argument: "It may be said that they observed the requirement that the title be clearly expressed in the title." But he claimed only a partial observance of the requirement, either in the amendment of 1893 or the subsequent amendment up to and including 1911 (laws 1911, ch. 123). And he contended that, "when the title of an act or particular section of a statute the title must be germane to the subject sought to be amended, or it will be void." *Hurford*, 11 Neb. 377.

It is necessary to give a history of the section which was obtained. As it now reads: "That the aggregate of school bond taxes, shall in no case exceed five mills. But the board of education may issue bonds upon bonds which they are hereby authorized to do."

powered to issue, bearing a rate of interest not to exceed six per cent. per annum, payable annually or semi-annually at such place as may be mentioned upon the face of the bonds; which loan shall be paid and reimbursed in a period not exceeding thirty years from the date of said bonds. Provided, that no bonds shall be issued nor the question of issue submitted to the voters without the consent of two-thirds of the members of the board of education, and be offered in the open market and sold to the highest bidder for not less than par value of the dollar; and provided further that no bonds shall be issued by the board of education without first submitting the proposition of issuing said bonds at an election called for that purpose, or at any regular election, notice whereof shall be given for at least twenty days in one or more papers published within the district to the qualified voters of the district, and if a majority of the ballots cast at such election shall be for issuing bonds, said board may issue bonds in such amount as may be named in the election notice. Provided, that in cities of the first class having over twenty-five thousand inhabitants, if such question is submitted at a special election, it shall require to carry the same a two-thirds majority of the votes cast at said election." Comp. St. 1911, ch. 79, subd. XIV, sec. 24.

In the year 1881 the legislature passed a comprehensive general statute entitled "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78 (Comp. St. 1881, ch. 79). It contained 14 subdivisions. The fourteenth subdivision was under the heading "Subdivision XIV. Schools in Cities," and the particular section in controversy was section 24 of the fourteenth subdivision of the act, in which subdivision there were 29 sections. Each subdivision was sectionized and put under an appropriate heading.

The first section of said subdivision 14 provided, among other things, that each incorporated city, or those hereafter incorporated as such, having a population of more than 2,000, including such adjacent territory as now is, or

hereafter may be, attached for school purposes, shall constitute one school district and be known by the name of "School District of City." This section was put in the Compiled Statutes of 1881 under the subtitle of "Subdivision XIV. Schools in Cities," and under the general title "Chapter 79. Schools." At that time there were in the Compiled Statutes of 1881 15 subdivisions under chapter 79 covering the Nebraska system of public instruction. At present in the Compiled Statutes of 1911, under chapter 79, there appear to be 19 subdivisions. Said original section 24, subd. XIV, Comp. St. 1881, was then as follows: "That the aggregate school tax shall in no one year exceed one per cent. upon all the taxable property of the district."

Section 22, subd. XIV of said act, authorized the board of education, if they found an indebtedness existing against the school district in the form of bonds issued for a valuable consideration in accordance with the law, and the validity of which had not been called in question, or, being called in question, had been declared by the courts of last resort to be valid, to issue to the holders thereof, who should surrender the same to the board, *other bonds* in like amount of the same tenor and effect, after the payment of principal and interest, as the bonds so surrendered.

Said subdivision XIV, ch. 78, laws 1881, was carried into the Compiled Statutes of 1881 in its entirety, and was designated in said statutes as subdivision XIV, ch. 79, each section seemingly retaining its original number (sections 1-29). At that time the educational system of the state was included under "Chapter 79. Schools."

The legislature of 1883 passed a law (laws 1883, ch. 72) entitled as hereinafter set forth. This was an amendment of many sections of different subdivisions, and made section 24, subd. XIV, read: "That the aggregate school tax shall in no one year exceed two per cent. upon all the taxable property of the district." The change was the striking out of the words "one per cent." in the original

their place "two per cent." in the amendment, ch. 72, sec. 25 (Comp. St. 1883, ch. 79, § 24).

amended by the legislature of 1883 as carried into the Consolidated Statutes of 1892. It was placed under "Subdivision 1 Cities." The whole legislation of the State touching schools appeared in this book under the head "Chapter 44. Public Instruction."

gislature passed a law (laws 1893, ch.

act to amend sections 3706, 3721 and on XIV, chapter 44 of the Consolidated Statutes, and to repeal the original sections

seems to have contained the first promising money for school districts for future of bonds. Section 3722, as amended

carried into the Compiled Statutes of d. XIV, sec. 24), and this same amend-

ried into the Compiled Statutes of 1895 (IV, sec. 24), and was made to read:

ate school tax shall in no one year ex-
t., and in cities of the first class having
housand (25,000) population the school
eed fifteen (15) mills upon all the tax-
the district, but the board of education

y upon the bonds, which they are hereby

authorized and empowered to issue, bearing a rate of interest not exceeding six (6) per centum per annum, payable annually or semi-annually, at such place as may be mentioned upon the face of such bonds; which loan shall be paid and reimbursed in a period not exceeding thirty (30) years from the date of said bonds; provided, that no bonds shall be issued nor question of issue be submitted to the electors without the consent of two-thirds ($\frac{2}{3}$) of the members of the board of education, and be offered in open market and sold to the highest bidder for not less than par value on each dollar; and, provided further, that

no bonds shall be issued by the board of education without first submitting the proposition of issuing said bonds, at an election called for that purpose, or at any regular election, notice whereof shall be given for at least twenty (20) days in one or more daily papers published within the district, to the qualified voters of the district, and if a majority of the ballots cast at such election shall be for issuing bonds, said board may issue bonds in such an amount as shall be named in their election notice; provided, that in cities of the first class having over twenty-five thousand (25,000) inhabitants if said question is submitted at a special election it shall require to carry the same a two-thirds ($\frac{2}{3}$) majority of the votes cast at said election."

Section 24, as it appeared in the same numbered section in subd. XIV, ch. 79, Comp. St. 1893, and the Compiled Statutes of 1895 into which it was also carried, contained the provisions concerning the issue of bonds.

This amendment of section 3722, subd. XIV, ch. 44, Consolidated St. 1891, is claimed to be unconstitutional and void because, as it is alleged, the amendment was not germane to the subject matter of said section 3722, being section 24 referred to. It will be seen that the legislature attempted to confer upon the board of education the power to borrow money upon the bonds of the school district upon the terms and conditions fixed in the section. It is claimed by the attorney general that section 24 has remained substantially the same up to the present time, so far as the power which it attempted to confer upon the board of education to borrow money and issue bonds.

In 1897 said section 24 was amended under the title, "An act to amend section 24, chapter 79, subdivision XIV of the Compiled Statutes of 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section 24, chapter 79, subdivision XIV of the Compiled Statutes of 1895." Laws 1897, ch. 70.

The legislature of 1901 passed a law (laws 1901, ch. 69)

entitled "An act to amend section 24 of subdivision XIV, of chapter 79 of the Compiled Statutes of Nebraska." Section 24, as amended, was carried into subdivision XIV, ch. 79, Comp. St. 1901.

In 1903 the same section was amended under the title "An act to amend section 24 of subdivision XIV, chapter 79, Compiled Statutes of Nebraska, and to repeal said original section." Laws 1903, ch. 94.

In 1911 the legislature passed a law (laws 1911, ch. 123) entitled "An act to amend section 24, subdivision XIV, chapter 79 of the Compiled Statutes of Nebraska for 1909 (Cobbey's Ann. St. 1909, sec. 11814), relating to aggregate levy of school taxes in incorporated cities and villages, fixing the limit of said levy at thirty-five mills, and to repeal said original section as it now exists." Under this title the legislature gave us the law as it is today, being the one under which the relator proceeded to issue the bonds, and which we have heretofore set forth. It would seem that the provisions of the amendments of section 24, ch. 123, laws 1911, so far as the same relate to the borrowing of money and the issuance of bonds, are substantially the same as were contained in the acts of 1893, 1897, 1901, and 1903.

The amendment made in 1893 provided that the board of education might borrow money upon the bonds of the school district bearing a certain rate of interest not exceeding 6 per cent. per annum, fixed the time for which the loan should be made at not exceeding 30 years, and provided that no bonds should be issued unless the question of their issue should first be submitted to the electors with the consent of two-thirds of the members of the board; that the bonds should be offered in the open market and sold to the highest bidder for not less than par value; also that no bonds should be issued without submitting the proposition of issuing the same at an election called for that purpose, or at any regular election, of which notice shall have been given for at least 20 days by publication in one or more daily papers published within

the district, and providing, further, that in cities of the first class having over 25,000 inhabitants the said question should be submitted at a special election, and should require a two-thirds majority of the votes cast at such election to carry the proposition.

An examination of section 24 shows that it provided that the aggregate school tax in one year should not exceed 1 per cent. upon all the taxable property of the district. As it was amended by the act of 1883 it provided that the aggregate school tax in one year should not exceed 2 per cent. upon all the taxable property of the district. The act as originally passed, and as it was amended in 1883, clearly provided a limitation upon the aggregate school tax to be levied in any one year upon all the taxable property of the district.

In 1893 the section 24 was amended, the act changing the limitation of taxation for general school purposes from 2 per cent. to 15 mills, and, the same being within the title, was valid legislation, and, in lieu of the 5 mills reduction, the act provided that the board might borrow money and issue bonds therefor under the title which was to amend section 24 which then contained a limitation of 2 per cent. upon the power of taxation; the legislature changed the manner of raising the amount so limited, providing that a part thereof might be raised as theretofore had been done, and that the remainder thereof might be raised by issuing bonds in lieu of a direct levy.

The title of the act of 1883 (laws 1883, ch. 72) was "An act to amend section 4, subdivision 1, sections 4, 13 and 14, subdivision 2, section 10, subdivision 3, sections 4, 11, 16 and 17, subdivision 4, sections 3, 4 and 12, subdivision 5, sections 1, 2 and 3, subdivision 7, sections 5 and 6, subdivision 10, and sections 1, 3, 8, 12, 13, 15, 18, 24 and 26 of subdivision 14 of an act entitled 'An act to establish a system of public instruction for the state of Nebraska,' approved March 1, 1881, being chapter 79 of the Compiled Statutes of 1881."

Section 24 of subdivision XIV is the particular section

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re have been deceived and

By looking at the title, it amends 26 different sections and subdivisions, 8 of which a member of the legislature a bill knew, if he read the and 26 sections in 8 subdivisions at least 14 subdivisions; it to be amended was an act tion laws that had been es- is further part of the title oved March 1, 1881, being tutes of 1881." By looking l Statutes of 1881 we find ools." There were 15 sub- nder the heading "Schools" 81. The particular section led Statutes of 1881 along the fourteenth subdivision ons, including 24, were all on up to that time provided slatures which had enacted subdivisions of the act of section 24 under considera- isolidated Statutes of 1891 er the heading "Public In- 24 (p. 808) reads: "Sec- school tax shall in no one all the taxable property of ted Statutes of Nebraska C. Allen, secretary of state ember 15, 1891, and it is obey, who appears to have otate, edit, and publish all then in force, and he does ontained in this volume are originals, as shown by the the original rolls now on

file in the office of the secretary of state." The Consolidated Statutes of Nebraska became an authorized compilation supposed to contain all the laws of the state of Nebraska, and when the legislature referred to chapter 44, Consolidated Statutes of Nebraska, it referred to the system of public instruction provided for Nebraska by preceding legislatures, and it would be so recognized by the state government, by the school district officers, and by subsequent legislatures. The particular section 3722 of the Consolidated Statutes of Nebraska (Comp. St. 1881, ch. 79, sec. 24) was amended along with sections 3706 and 3721 which were carried along with it, and all three of the sections as originally existing were repealed. Section 4, ch. 31, laws 1893, provides that "sections 3706, 3721, and 3722, of subdivision XIV, chapter 44 of the Consolidated Statutes of Nebraska as now existing be and the same hereby are repealed." The sections had all become part of Nebraska's educational system of laws, and they were amended and repealed, and it would seem that they were so amended and repealed by a statute which could have deceived no one. The amendment was not an amendment alone of a section. The whole of chapter 44 of the Consolidated Statutes of Nebraska is devoted to the elaboration of that system, and the act in question was an amendment, as it would seem, not of the particular section alone, but of the fourteenth subdivision of chapter 44 of the Consolidated Statutes of Nebraska, and it amended sections in other subdivisions, as stated in the act, and indicated by the title. It was this amendment that provided for the issue of school district bonds, and which found section 24 part of the educational system of Nebraska, and amended it by attempting to provide for the issue of bonds.

It is claimed by counsel that the rule laid down by this court in *Miller v. Hurford*, 11 Neb. 377, disposes of the case and prevents the registration of the bonds. Judge MAXWELL delivered the opinion of this court in that case. In the opinion he says: "But an amendment must be

germane to the subject matter of the *act or section* to be amended." The purpose of the constitutional inhibition is not to be lost sight of. Judge MAXWELL did not lose sight of it. He calls attention to that provision of our constitution which says, among other things: "No bill shall contain more than one subject, which shall be clearly expressed in its title." He says of this provision, that it makes "inviolable the rule governing legislative bodies, that 'no proposition or subject different from that under consideration shall be admitted under color of amendment.'" He says: "Experience has shown that, in the absence of constitutional restrictions, the rule at times is liable to be overthrown, and objectionable and pernicious legislation is the result." He continues: "To guard against this evil, our constitution prohibits more than one subject being *embraced in a bill*." It would seem that there can be no reasonable objection to the effect of the language used by Judge MAXWELL in the body of the opinion. The constitutional inhibition against more than "one subject being embraced in a *bill*" cannot be too strenuously insisted upon or too earnestly emphasized, because the purpose of the constitution, which is the recorded will of the people and which restricts the action of the legislature, is to prevent surreptitious legislation. Experience has demonstrated that legislators sometimes act in a clandestine and deceptive way. The purpose of the constitution is to confine legislative action to one subject, and that only the subject then under consideration, and if that subject is indicated by the title of the act which is being amended, or if the proposed amendment is clearly within the subject matter indicated by the title or section, then can there be any deception of the members of the legislature?

Because of the importance of the decision in *Miller v. Hurford*, 11 Neb. 377, it may be well to examine that case. The action was brought to foreclose certain alleged tax liens. The plaintiff alleged the purchase of five acres of ground for the taxes due thereon for certain years, and

that as a purchaser of said land he had paid other taxes, which he specified, the total amounting to \$1,141.21. On the trial of said case there was a decree for the sum of \$1,688 in favor of the plaintiff. Redick and Connell, the defendants, appealed to this court. This court determined that the plaintiff was entitled to a decree for the money actually paid by him in purchasing said lands at said tax sale, and for taxes necessarily paid upon said lands, together with interest at the rate of 12 per cent. per annum, and that the lands should be sold as upon foreclosure of a mortgage, and the proceeds applied to the payment of the amount found due and the costs. The title of the act of 1871 (laws 1871, p. 81), referred to and under which the foreclosure proceeded, is as follows: "An act to amend sections fifty, fifty-one, seventy-one, and one hundred and five of an act entitled 'An act to provide a system of revenue,' approved, February 15, 1869, and to make further provisions for collecting revenue." The title of the act does not cover the sale of land for the nonpayment of taxes. Concerning section 51 above mentioned, Judge MAXWELL says: "The subject matter of section 51 is to make taxes upon real property a perpetual lien thereon against all persons and bodies corporate except the United States and this state. Any amendment to the section in relation to the lien or mode of enforcing it is valid. But extraneous matter not relating to the subject of the section is in no sense an amendment, is within the inhibition of the constitution, and void." The thing done by this court in *Miller v. Hurford* was to declare the taxes paid a lien upon the land and to decree the sale of the land to pay such lien as upon foreclosure of a mortgage. The plaintiff had a lien upon the land for the taxes. Speaking for this court, Judge MAXWELL foreclosed the lien as contemplated by the amendment to the section, but he did not allow the 40 per cent. per annum rate of interest provided for by the act. He only allowed interest at 12 per cent. per annum. In view of what he said and did, he probably considered, along with the other

of this court, that the penalty part was uncon-

seem that there should be a broad construction of the constitutional restriction that would not defeat the manifest intent of the legislature. Of course, the duty of the legislature in all such cases is to amend the constitution. The constitution says nothing whatever about amendments. The real thing to be guarded against is the election of one member of the legislature by another, the election of many members of the legislature by one who draws a bill intended to deceive the members as such a bill presented and thereby does deceive and induces them to pass an act which is surely in its nature and perhaps vicious. Any amendment to the constitution ought to be such an amendment as has been made to the act at the time of the consideration of the original bill. The constitution does not prohibit the amendment of the act. It is always to be expected that first efforts will be ineffectual, and that it is necessary to prepare and pass amendments. The constitution is only directed against surreptitious legislation which the members of the legislature and the public take no notice. Suppose when an amendment to the constitution is offered it is held to relate to such subject matter as might have properly been considered at the time the original bill was under consideration by the legislature, and it was clearly within the title of such bill and the general scope and purpose of the act, and the language of the section, then would there be anything done to the public by the passage of the amendment?

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these legislators in referring to the section by its number is not prohibited, and it is perhaps only done for convenience, but it is assumed that a wrong is intended if anything else is put in the bill except matter of exactly the same kind as that contained in the section. It would seem to be unfair to the legislature to assume that it intends to pass surreptitious or clandestine acts for the purpose of deception, when its action is limited to such matters as are clearly indicated by the title of the original act, or the language of the section to be amended. Suppose we apply this reasoning to the instant case. The title of the act was "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78. If the amendment made to the original section 24 was one that might fairly have been contemplated under the title of the original act, has any harm been done to any one by the amendment of that act so as to enable the boards of the school districts to issue bonds and to borrow money and build school houses in accordance with the necessities of the people and their children, and according to the vote of the electors of the school district?

One of the constitutional restrictions is that "no bill shall contain more than one subject and the same shall be clearly expressed in its title." In *Kansas City & O. R. Co. v. Frey*, 30 Neb. 790, it was said, concerning this provision, that no bill shall contain more than one subject, this clause of the constitution "was never designed to place the legislature in a strait-jacket and prevent it from passing laws having but one object under an appropriate title." Concerning the rule as applied, Commissioner IRVINE, in *Trumble v. Trumble*, 37 Neb. 340, said: "Provided the object of the law be single the whole law may be embraced in a single enactment, although it may require any number of details to accomplish the object."

In *Smails v. White*, 4 Neb. 353, the act then under consideration was held to be unconstitutional because it undertook to shorten the time within which the transcript must be filed in the appellate court on taking an appeal

from the judgment of the probate judge or justice of the peace, and, second, to fix the time for filing the petition after the appeal and time for making up the issues in the case. It was held that there were two subjects.

In *State v. Lancaster County*, 6 Neb. 474, Judge GANTT in delivering the opinion of the court, among other things, said: "Notwithstanding the very restrictive terms of the title to the act in question, it not only contains provisions in regard to township organization, but it also provides for county organization and defines its corporate powers; it determines the number of county officers, defines their duties, provides for their election, and limits the terms of their respective offices, and it also materially amends and changes the general revenue laws."

In *State v. Lancaster County*, 17 Neb. 85, it is said by the attorney general that a provision in an amendatory act repealing an act not connected with the subject of the amendment is declared void. An examination of the case cited shows that the act was entitled "An act to amend an act entitled 'An act to provide for the registry, sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands,' being art. I, ch. 80, Compiled Statutes. *Also to repeal article III of said chapter 80.*" The court said: "Article III of chapter 80 is no part of the act amended, nor does it relate to subjects embraced either in the original act or as amended." An examination of the Compiled Statutes of 1881 and 1883 shows that the subject referred to in article III of chapter 80 is "refunding taxes," an entirely different subject.

In *City of Tecumseh v. Phillips*, 5 Neb. 305, the act under consideration undertook to exempt cities which had collected moneys from licenses for the sale of intoxicating liquors, and which had expended the same, from paying the money over to the county treasurer. By the section of the act in question they were declared "hereby exonerated from any and all liability therefor." The

title of the act in no way indicated this section. It was held that the section was void. The case of *White v. City of Lincoln*, 5 Neb. 505, presented the same question as in the former case of *City of Tecumseh v. Phillips*.

In *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb. 507, the title of the act to be considered was "An act to amend 'An act to provide for the registration of precinct or township and school district bonds.'" This act is also contained in the laws of 1875, p. 185. It was sought to change the former statute by this amendment so as to read: "It shall be the duty of the board of county commissioners in each county to levy annually upon all the taxable property in each precinct or township and school district in such county a tax sufficient to pay the interest accruing upon any bonds issued by such precinct, township, or school district, and to provide a sinking fund for the final redemption of the same; such levy to be made with the annual levy of the county, and the taxes collected with other taxes, and, when collected, shall be and remain in the hands of the county treasurer a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity." It was held that the foregoing matter was void because of the fact that the title only provided for the registration of the bonds.

In *State v. Tibbets*, 52 Neb. 228, the second point of the syllabus reads: "Where the title to a bill is to amend an *existing act*, or a section thereof, no amendment is permissible which is not germane to the subject matter of the *original act or section indicated*." Judge NORVAL, delivering the opinion of the court in the same case, said: "It has been uniformly decided that the provision of the constitution is mandatory, and that the courts will not declare a statute unconstitutional unless it is clearly so." He also said: "The purpose of the constitutional provision * * * is to give notice, *through the title of the bill*, to the members of the legislature and the public, of the subject matter of the projected law,—in other words,

that the title should clearly indicate the legislation embraced in the bill." He also said: "While the requirements of this clause of the constitution are mandatory, they are not to be exactly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute."

In *Ives v. Norris*, 13 Neb. 252, it was held that the title to "An act regulating the herding and driving of stock" was not broad and comprehensive enough to sustain a provision giving damages for the castration of animals. In that case there was an action to recover the value of a grade Durham bull alleged to have been castrated by the plaintiff. On a trial in the county court there was a verdict and a judgment for the defendant. The case was taken to the district court on error and the judgment affirmed. The section under consideration provided: "No stallion over the age of 18 months, nor any Mexican, Texan or Cherokee bull over the age of 10 months, nor any Mexican ram over the age of 8 months, shall be permitted to run at large in the state of Nebraska." The remainder of the section provided that the owner or person in charge of such animals was prohibited from permitting them to run at large, and that such person might be fined, and further provided: "It shall be lawful for any person to castrate or cause to be castrated any such animal running at large." Concerning this act, it was held that the title of the act must express the subject of the bill; also, that, "if the bill have but one general object which is fairly expressed in the title," it will be sufficient—giving many citations.

In *Ex parte Thomason*, 16 Neb. 239, it was held that "an act to prevent the fraudulent transfer of personal property" was too restrictive in its title to include legislation making it a crime to remove mortgaged property out of the county.

In *Holmberg v. Hauck*, 16 Neb. 337, it was held that, under the title "An act to provide for the organization,

government, and powers of certain cities," the legislature could not invest police courts with a concurrent and co-extensive jurisdiction with county courts in ordinary civil cases.

In *Touzalin v. City of Omaha*, 25 Neb. 817, it was held that the title "An act to incorporate cities of the first class and regulating their duties, powers and government" did not permit a provision in the act forbidding the granting of injunctions to restrain the levy and collection of a special tax or the assessment to pay the cost of a city improvement.

In *State v. Holcomb*, 46 Neb. 612, it was held that section 5, ch. 66, laws 1895, providing for the leasing of convict labor, was in conflict with the clause of the constitution requiring the subjects of acts to be clearly expressed in their title.

In *Fish v. Stockdale*, 111 Mich. 46, the title of the act was "An act to amend section 1 of act No. 159, session laws of 1891, entitled 'An act to regulate the taking and catching of fish in the inland waters of this state.'" The actual title to the act amended read as follows: "An act to regulate the taking and catching of fish in the inland lakes of this state." It will be seen that there was no such act as the one described in the title to the amending act. In the act to be amended occurs the word "lakes," and in the amendatory act the title of the act to be amended contains the word "waters" in the place of "lakes." The Michigan court held that the title gave no notice to the legislators or to the people that the bill provided that the provisions of the original act should be extended to other subjects.

In *New York & G. L. R. Co. v. Inhabitants of Montclair*, 47 N. J. Eq. 591, there was an appeal from a decree overruling a demurrer to a bill. The bill was filed by the inhabitants of the township of Montclair to compel the railroad to construct a bridge across a cut alleged to impede the public travel along a public road within the township. One of the questions involved was the consti-

tutionality of the act under which the action of the court was invoked. The title of the act was "An act entitled 'A supplement to an act entitled "An act to authorize the formation of railroad corporations and regulate the same," approved April 2, 1873,' which supplement was approved March 31, 1882." The court said: "It is perceived that, while the act does not purport to be a supplement to the supplement of March 31, 1882, its effect is to leave the impression that it is a supplement to the earlier supplement. Any person reading the title to the act would conclude that the subject of the statute was the same as that involved in the act of March 31, 1882." The court then said that the act last mentioned "deals with a subject entirely foreign to the subject matter of the present statute. The act of March 31, 1882, * * * deals with the reduction of the capital stock of railroad companies under certain conditions. It is too obvious for argument that the title was entirely misleading. * * * For this reason the act is void."

Along the same line is the case of *Harper v. State*, 109 Ala. 28, 19 So. 857. In that case an act entitled "An act to amend an act for the trial of misdemeanors in Shelby county, approved February 12, 1891," was held to conflict with the constitution of Alabama providing that "each law shall contain but one subject, which shall be clearly expressed in the title." The trouble with the amended act was that it provided for the trial of felonies, something not included by the title.

In *State v. Tibbets*, *supra*, this court laid down the following rules: "Under the authorities the following propositions governing the enactment of laws are embraced in section 11, article 3 of the constitution: First. A plurality of subjects is prohibited. Second. The title of an act must fairly express the subject of legislation. Third. Matters can only be included in an amendatory bill which are germane to the original act. Fourth. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or

sections as amended, and repeal the original section or sections." Authorities are cited in support of the propositions stated. Applying the rules herein laid down to the instant case, can it be said that any of these rules are violated? Concerning the contention that the title of the act does not fairly express the subject of legislation, we say that the amendment offered was an amendment to the educational system of the state. It did not purport to be an amendment alone of a particular section, but it amended three sections of subdivision XIV, of chapter 44, of the Consolidated Statutes of 1891. At the time it did so, said chapter 44 contained the whole educational system of Nebraska, and the act in question amended that system, and it amended a statute book that had been recognized by the legislature, known as the Consolidated Statutes of Nebraska.

In *State v. Tibbets, supra*, the court quoted from the brief of counsel: "The rule that an amended section must be germane to the original section amended is not a rule established by constitutional authority, but is one which necessarily arises from a compliance with the above named constitutional provision; and it simply arises from the fact that when a section is amended it is supposed to stand by itself in its amendment, to take unto itself a title which the subject matter of this section will allow and must be confined to a certain object. That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be confined to the same subject matter, or have the same object in view, and this subject matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient." Now, concerning this argument made by counsel, Judge NORVAL said in the opinion: "But it did not so confine itself in this case." Here is seemingly a recognition of the proper rule. If this rule is applied to

it would seem that it must be held that relate back to the original title of the act to establish a system of public instruction of Nebraska," and under which sought to be done in this case might be

Whisenand, 88 Neb. 640, it was concerning the name of the school district was district of Harvard, in the County of Clay, Nebraska" as fixed by statute, and the was "Harvard School District No. 11, Nebraska," the variation was material. The objection: "This objection, in the light of facts, is too technical for consideration," said of this: "We think it would be incorrect to hold that such use would invalidate actions taken by the board of a school district in that case seemingly tends to show the view of this court that it is no part of its duty to hold that which the people have built up in the course of time, labor and money, coupled with the fact of legislation. This view is seemingly correct." That the court further said: "That the members of said district have, since May, 1887, the interests of public instruction for various reasons, in one instance for the period of three years has ever been instituted by plaintiffs or by the state to question the right of the district to operate under subdivision XIV, ch. 79, and no written objection thereto has ever been made by any county superintendent or with the members of said school district; * * * that the residents and taxpayers and legal voters of said district for from 6 to 23 years. It thus appears that said school district has been in existence and operation performing all the functions and duties thereof for over 23 years, without any objection thereto by any resident, legal voter or taxpayer."

Mr. Pettis, who objects to registering the bonds, in his brief as *amicus curiæ* says that the same rule does not apply where the attempt is to amend a specific section as where the attempt is made to amend a chapter. And he says: "Nor does the same rule apply as in cases where the title is 'An act to amend chapter 79 of the Compiled Statutes for the year 1909, and to repeal certain specified sections thereof.'" Now, he says in such a title as that, in such a case, it may be well said that that title is broad enough to permit by way of amendment the addition of any new matter which might have been included under the original title. He also says: "It will be conceded that usually the people have no knowledge of what is before the legislature, except what may be acquired from the custom of the press in publishing the titles of the several bills as they are introduced. Very rarely indeed is the full text of a bill published by the press, and, of course, until the legislature is over the session laws are not available." He then says: "Would they (the people) have any idea of notice that the legislature proposed to provide for the calling of an election, fixing the rate of interest which a bond might carry, and to confer a power to borrow money and issue bonds in an unlimited amount, etc?" Continuing he says: "If, however, the title was an act to amend a previous act, as for instance chapter 79, laws of 1909, then they would have fair notice that the legislature might be proposing to make radical changes in the entire law and that it behooved them to watch out." In the careful brief which Mr. Pettis has filed in the case, he has seemingly admitted the force of the proposition that there is no deception if the matter proposed to be amended is made a part of the educational system of the state. Courts may not be expected to look with favor upon an attack of a purely technical nature if there has been a substantial compliance with the main purpose of the law. In this case since 1893 the section referred to has been amended from time to time, and it provides at the present time for the issue of bonds very much as it did

after it had been amended by the act of 1893 which provided for their issue. If this was objectionable it should have been attacked long ago. It is an integral part of the educational system of the laws of the state. To declare it unconstitutional and void is to unsettle and depreciate the value of school securities in our state. It would seem that the brief of counsel who appears as the friend of the court to assist the attorney general is an admission of the fact that there may have been no deception of the public or of the legislature by the use of the title employed to designate the amendment made in 1893. By looking at chapter 79 of the Compiled Statutes of 1881 the person who looked saw the heading "Chapter 79. Schools." When the same person looked at chapter 44 of the "Consolidated Statutes of 1891" he saw the heading "Public Instruction. Schools." He further saw, when he looked at the last mentioned book, "Consolidated Statutes of 1891," that the book was certified by the secretary of state, and by J. E. Cobbey, who seems to have been "appointed by the legislature of the state of Nebraska to compile, annotate, edit, and publish all the general laws of the state now in force," and saw that he certified "that the laws contained in this volume are true and accurate copies of the originals, as shown by the Revised Statutes of 1866, and the original rolls now on file in the office of the secretary of state."

The amendment of 1893 put into section 24 and into the act to which the section belonged the provisions concerning the issue of bonds for the use of the district. The first amendment of section 24, after that provision of 1893 was put into it, adopted the provision as it found it. Section 24, as it appeared in subdivision XIV, ch. 79, Comp. St. 1893, and in the session laws of 1893, ch. 31, contained the provision concerning the issue of school bonds. It was put into the session laws of 1893 under the title "An act to amend sections 3706, 3721 and 3722, of subdivision XIV, of chapter 44, of the Consolidated Statutes of Nebraska, and to repeal the original sections amended."

Section 3722, referred to as being in the Consolidated Statutes of Nebraska, corresponds to section 24 of the Compiled Statutes of 1893, and for two years before the meeting of the next legislature this act was published as a part of the educational system of the state in the session laws and in the other publications containing the statutes of the state. The residents of the district and the members of the legislature could all see the section with the provision in it to issue bonds. When section 3722 was amended by the passage of the act of 1893, it was amended under a title that could not have deceived any one, because it appeared as subdivision XIV, of chapter 44, of the Consolidated Statutes of Nebraska, which contained the whole educational system of the state. We call attention to the fact that the act of 1893 changed the limitation of taxation for general school purposes from 2 per cent. to 15 mills, which, of course, was within the title and was valid legislation, and on account of its change and in lieu of the 5 mills' reduction the act provided that the board might borrow money and issue bonds therefor. Under the title which was to amend section 24, which then contained a limitation of 2 per cent. upon the power of taxation, the legislature changed the manner of raising the amount so limited, providing that a part thereof might be raised as theretofore had been done, and that the remainder thereof might be raised by issuing bonds in lieu of a direct levy.

In 1897 the legislature passed an act entitled "An act to amend section 24, chapter 79, subdivision XIV, of the Compiled Statutes, 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section 24, chapter 79, subdivision XIV, of the Compiled Statutes of 1895." Laws 1897, ch. 70. This title, it will be noticed, mentions school bonds and the section of the Compiled Statutes referred to, as the section appeared in the statutes of 1895. Section 24, as it appeared in the statutes of 1895, had prefixed to it as head words,

"Limitation of Taxation. Bonds." The section also appeared under "Subdivision XIV. Schools in Cities." This section, so formed, went into the Compiled Statutes of 1901 as section 24, subd. XIV, ch. 79. If the laws which were enacted prior to 1901 amending this section are unconstitutional as far as they authorized the issuing of bonds, the section, as it existed before the act of 1897, was repealed by that act and the substance thereof reenacted. There can be no doubt then, whatever may be thought of the prior legislation referred to, that at least a part of the section, as it appeared in the Compiled Statutes of 1901, was valid. Under the conditions which we have recited, the legislature might well have supposed the whole section constitutional. In 1903 the legislature, regarding the section as valid as it appeared in the Compiled Statutes (for we must uphold acts of the legislature if it is reasonably possible to do so) enacted a statute entitled "An act to amend section 24, of subdivision XIV, chapter 79, Compiled Statutes of Nebraska, and to repeal said original section." Laws 1903, ch. 94. The purpose of the constitutional provision in question is to prevent surreptitious legislation; to enable all members of the legislature to know from the title of the proposed law what general subject it intended to legislate upon. Would the fact, if it were a fact that some part of the section named in the title of the act might, by strict construction, be found unconstitutional prevent the lawmakers from taking notice that it was intended to legislate upon the general subject of the section as it appeared in the authorized compilation of the laws? We do not think we ought to give such a meaning to the rule announced in *Miller v. Hurford*, *supra*. If the title is such that it must necessarily call attention to the general subject of the proposed legislation, it cannot be said that the subject is not expressed in the title, when we consider the purpose of the constitutional requirement and the evil it was designed to remedy. The amendment of 1903 was germane to the section of the Compiled Statutes named in the title,

within the meaning of the rule in *Miller v. Hurford, supra*. The section so amended is now section 24, subd. XIV, ch. 79, Comp. St. 1911.

There can be no doubt that the legislature intended to provide a law to enable school districts containing cities to borrow money according to their needs. For 18 years said section 24 has been acted upon by all the city school districts in the state, except the metropolitan city school districts and those districts containing cities having a population of from 25,000 to 40,000. Concerning the latter class, it should be said that the legislature of 1903 passed an act almost identical with said section 24 and in almost the same words. Laws 1903, ch. 98, sec. 27 (Comp. St. 1903, ch. 79, subd. 14a, sec. 27). This action clearly shows the purpose of the legislature to authorize school districts to borrow money by issuing their bonds; unless the amendments made to section 24 have enabled it to become a valid law, then all the school districts in the state containing a city of more than 1,500 inhabitants and less than 25,000 are left without any way to issue bonds and borrow money. Every reasonable intendment is in favor of the constitutionality of section 24. It should be held valid unless it clearly violates the spirit of the constitutional limitation. There is perhaps little tendency at the present time to substitute the will of the judges for the expression of the people through their representatives in legislative session assembled. What the legislature declares to be the law should be accepted as such by the courts unless there is a clear disregard of constitutional restrictions.

In *State v. Board of Control*, 85 Minn. 165, the legislature had passed an act under a title which reads, "An act to create a state board of control, and to provide for the management and control of the charitable, reformatory and penal institutions of the state, and to make an appropriation therefor, and to abolish the state board of corrections and charities." The state normal schools of Minnesota were placed under the management of the

board of control, and a member of the normal school board objected, and on his relation the attorney general brought *quo warranto* to test the right of the board of control to manage the financial affairs of the normal schools of the state. It was claimed by the attorney general that the statute creating a "State Board of Control," so far as it related to normal schools, was in violation of section 27, article 4 of the state constitution, providing that "no law shall embrace more than one subject, which shall be expressed in its title." The Minnesota court prepared and delivered an exhaustive opinion holding that normal schools were within the title of the act and that the act was valid. The court laid down the following rules set forth in the first paragraph of the syllabus: "That every law is presumed to be valid; that this provision of the constitution is to be liberally construed, and all doubts resolved in favor of the law; that the title should also be liberally construed, giving to its general words paramount weight; that it is not essential that the best or even accurate words in the title be employed, but the remedy to be secured and mischief avoided furnishes the best test of its sufficiency to prevent such title from being made a cloak or artifice to distract attention from the substance of the act, provided the title be fairly suggestive, and not foreign to the purpose of the statute." In the body of the opinion the court say: "The duty of a court to set aside a statute because it is invalid is peculiarly an incident of our national and state policy." The court quote from the opinions of Chief Justice Shaw in *In re Wellington*, 16 Pick. (Mass.) 87, 26 Am. Dec. 631, Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch (U. S.) 87, Mr. Justice Washington in *Ogden v. Saunders*, 12 Wheat. (U. S.) *213, Mr. Justice Cornell in *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450, and Chief Justice Gilfillan in *Woodruff v. Town of Glendale*, 26 Minn. 78. Chief Justice Shaw said: "When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to

give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." Chief Justice Marshall said: "The question whether a law be void for its repugnancy to the constitution *is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.*" Mr. Justice Washington said: "If I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt, * * * that alone would, in my estimation, be a satisfactory vindication of it." Mr. Justice Cornell said: "Plenary legislative power is therefore the rule, while want of it is the exception. As a sequence it logically follows that every statute duly passed by the state legislature is presumably valid, and this presumption *is conclusive* unless it affirmatively appears to be in conflict with some provision of the federal or state constitution; and, in order to justify a court in pronouncing it invalid because of its violation of some clause of the state constitution, its repugnancy therewith must be so '*clear, plain and palpable*' as to leave no reasonable doubt or hesitation upon the judicial mind." Chief Justice Gilfillan said: "There is no express provision to that effect. But, rather than hold the law to be void, the court will find such provision by implication, if the act will admit of such construction," to sustain it.

The objection to these bonds because of alleged unconstitutionality of attempted legislation presents a very important question. The subdivision as amended applies to many cities of the state. If that part of section 24, as it now appears, which authorizes the issue of bonds is held unconstitutional, very many outstanding bond issues will be invalidated. Before leaving the consideration of this part of the case, it may be proper to say that the

constitutional inhibition does not seem to have been disregarded in its purpose, because there is no evidence of surreptitious legislation, and the statute sought to be attacked has been in use without question for eighteen years. Succeeding legislatures have recognized and amended it. We hold that the rule stated in the syllabus in *Miller v. Hurford*, 11 Neb. 377, is generally applicable. If there is nothing to indicate the subject of the proposed legislation except the language of the section named in the title, the rule stated will apply. The constitutional provision requires that the title of the act shall be such as to inform the members of the legislature upon what subject it is proposed to legislate in the act, but it is not indispensable that the title shall recite all the details of the proposed legislation. The legislature has amended this section many times since the authority to issue bonds has been incorporated therein and under proper titles, so that the legislature has been apprised of the purpose intended. The amendments of the section made in 1901, 1903, and 1911 each repealed as it was made the preceding amendment, and finally left the section as it at present exists. As these amendments were within the title of the original act, they each became valid as made, and the last amendment leaves the present section in force as if it had been included in the original act of 1881 or in the title of any subsequent amending act. To refuse to adopt this view is to leave this school district and others of the same class without the means to borrow money for needed buildings, and it unsettles and depreciates the value of school bonds approximating two millions of dollars.

We hold that section 24 is valid, and that the issue of the bonds thereunder was not forbidden.

With respect to the contention that the amendments were void because they did not contain sections 2, 3, 4 and 5 of subdivision 15 of the Compiled Statutes of 1911, it is enough to say that the subdivision indicated simply prescribes a different manner for issuing school bonds, and that it does not apply to the school district of Lincoln.

Concerning the question as to where the high school building should be located, and as to whether there should be an annex to a grade school building, it is the view of the court that these matters were not necessarily connected with the purpose to issue the bonds; that the location of the school buildings did not in any way determine whether the bonds should or should not be issued. There was no dual proposition. *Hurd v. City of Fairbury*, 87 Neb. 745.

It is alleged in the attorney general's brief that the district court should have held that the election was void because the school district takes in a larger amount of territory than that covered by the city of Lincoln. It is not shown that any voters in the territory outside of the limits of Lincoln were prevented from casting their votes, and no complaint is made by any voter that he was denied the privilege of voting. It would also seem that this question has been disposed of in the case of *Kockrow v. Whisenand*, *supra*, where the court held that it was not the population of the city or the population of the district which controlled, but it was the particular organization of the district which could not subsequently be questioned. It would seem that this question may not properly be raised except by the voter or voters who have been wronged; but, whether that be true or not, no such complaint is made in this case.

The last point offered is that the election notice was not published in each of the daily papers for the period of 20 days. The answer to that is that the statute does not require it. The allegation is that the notice was published in a weekly paper called the "Trade Review" for the period of 20 days. That is enough under the statute. The language is, "Notice whereof shall be given for at least 20 days in one or more papers published within the district."

The judgment of the district court is right, and it is

AFFIRMED.

REESE, C. J., not sitting.

ROSE, J., concurs in the affirmance only.

Syllabus by SEDGWICK, J.

1. **Statutes: AMENDMENT: CONSTITUTIONAL LAW: TITLE OF ACT.** The rule stated in the syllabus in *Miller v. Hurford*, 11 Neb. 377, "When the title of an act is to *amend* a particular section of a statute, the proposed amendment must be germane to the subject matter of the section sought to be amended or it will be void," is generally applicable and will be applied in all cases when there is nothing to indicate the subject of the proposed legislation except the language of the section named in the title of the amendatory act.
2. ———: ———: ———: ———. The purpose of the constitutional limitation (Const., art. III, sec. 11) that the subject of legislation must be clearly expressed in the title of the act is to prevent surreptitious legislation; to enable members of the legislature and others interested to know from the title of the proposed law what general subject it is intended to legislate upon. When the title of an act is to amend a particular section of the authorized compilation of the statutes which appears to be valid, it is sufficient if the amendment is germane to the section named in the title, although some part of the subject of such section might by a strict construction be found unconstitutional.
3. **Schools and School Districts: BONDS: SUBMISSION OF PROPOSITION FOR ISSUANCE.** A proposition of a school district to issue bonds must be submitted separate and distinct from any other that is not germane thereto. It is not necessary that it be submitted at an election at which no other proposition is submitted.
4. ———: ———: ———. An election upon a proposition to vote bonds for a new school building will not be invalid because at the same election the voters are asked to choose between two locations for the proposed building.
5. ———: ———: ———: **VOTING DISTRICT.** When a school district includes a city and also other territory, an election to vote bonds upon the property of the district will not be held invalid because no voting places are named in the territory outside of the city, if the electors in such territory are notified to vote at the nearest voting place in the city, and it does not appear that any elector was prevented from voting at the election.
6. ———: ———: ———: **PUBLICATION OF NOTICE.** The publication

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of the notice of school district election to vote bonds must be for 20 days prior to such election; such publication in a weekly paper of general circulation in the district is sufficient.

SEDGWICK, J., concurring.

The school district of the city of Lincoln applied to the district court for Lancaster county for a writ of mandamus to require the respondent, Silas R. Barton, as auditor of public accounts of the state of Nebraska, to register the bonds in the sum of \$350,000, issued by the district. Upon trial in the district court the writ was awarded as prayed, and the respondent has appealed.

It is contended that the school district of the city of Lincoln has no authority or power to issue bonds, the section of the statute under which these bonds were issued being unconstitutional. It is also objected that "the propositions submitted at said election" were illegal and void for the reason that they were dual, if not multiform," and that the election on the question of the issuance of said bonds was illegal and void for the reason that the school district extends beyond the limits of the city and that in this territory outside of the city limits there were no voting places provided where the school electors might appear and vote.

1. The objection to these bonds because of alleged unconstitutionality of attempted legislation presents a very important question. The subdivision as amended applies to all cities of the state which have 1,500 or more inhabitants with one or two exceptions. If that part of section 24, as it now appears, which authorizes the issue of bonds is held unconstitutional, very many outstanding bond issues will be invalidated. It is contended that section 24, subd. XIV, ch. 79, Comp. St. 1911, so far as it attempts to authorize issuing school district bonds, is unconstitutional. In 1881 the legislature enacted a comprehensive general statute entitled "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78. This statute, as originally enacted, contained 14 subdivisions. The fourteenth subdivision

consisted of 29 sections, and section 24 was as follows: "That the aggregate school tax shall in no one year exceed one per cent. upon all the taxable property of the district." In 1883 this section was amended, making the limit 2 per cent. instead of 1 per cent.— In 1891 this section appeared in the Consolidated Statutes of Nebraska as section 3722, subd. XIV, ch. 44; and in 1893 the legislature passed an act entitled "An act to amend sections 3706, 3721, and 3722 of subdivision XIV of chapter 44 of the Consolidated Statutes of Nebraska, and to repeal the original sections amended." Laws 1893, ch. 31. In this act the section as amended contains the provision that the board of education "may borrow money upon the bonds, which they are hereby authorized and empowered to issue," it is contended that this provision is void as not being within the title of the act, and that the same objection exists to the various subsequent attempts to amend this section.

In *Miller v. Hurford*, 11 Neb. 377, and in other cases, the rule is said to be that, "when the title of an act is to *amend* a particular section of a statute, the proposed amendment must be germane to the subject matter of the section sought to be amended or it will be void." It is said in the opinion: "An amendment must be germane to the subject matter of the act or section to be amended. * * * Experience has shown that, in the absence of constitutional restrictions, the rule at times is liable to be overthrown, and objectionable and pernicious legislation is the result." The opinion does not state the title of the act, but assumes that the provision which is held to be unconstitutional was made a part of the section amended. The title of the act was "An act to amend sections fifty, fifty-one, seventy-one, and one hundred and five of an act entitled 'An act to provide a system of revenue,' approved February 15, 1869, and to make further provisions for collecting revenue." Laws 1871, p. 81. This title refers to the general revenue act of 1869, and proposes to amend certain specified sections, "and to make further provisions for collecting revenue." That part of the act

held to be unconstitutional appears to have been introduced into the act under the last clause of the title, to make further provisions for collecting revenue.

This rule, however, stated in the syllabus is generally applicable. If there is nothing to indicate the subject of the proposed legislation except the language of the section named in the title, the rule stated will apply. The constitutional provision requires that the title of the act shall be such as to inform the members of the legislature upon what subject it is proposed to legislate in the act. It is not indispensable that the title shall recite the details of the proposed legislation. The legislature has amended the section now considered many times since the authority to issue bonds has become incorporated therein. In 1893 this section was amended. Laws 1893, ch. 31. The act changed the limitation of taxation for general school purposes from 2 per cent. to 15 mills, which, of course, was within the title and was valid legislation, and on account of this change, and in lieu of the five mills' reduction, the act provided that the board might borrow money and issue bonds therefor. Under the title which was to amend section 24, which then contained a limitation of 2 per cent. upon the power of taxation, the legislature changed the manner of raising the amount so limited, providing that a part thereof might be raised as theretofore had been done, and that an additional fund might be raised by issuing bonds in lieu of a direct levy. In 1897 the legislature passed an act entitled "An act to amend section twenty-four (24), chapter seventy-nine (79), subdivision fourteen (14) of the Compiled Statutes of 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section twenty-four (24), chapter seventy-nine (79), subdivision fourteen (14) of the Compiled Statutes of 1895." Laws 1897, ch. 70. The section of the Compiled Statutes referred to, as it appeared in the statutes of 1895, had prefixed to it as head words, "Limitation of Taxation: Bonds." This

section, so formed, went into the Compiled Statutes of 1901 as section 24, subd. XIV, ch. 79, and this title, it will be noticed, mentions school bonds. If the laws amending this section which were enacted prior to that time were unconstitutional as far as they authorize the issuing of bonds, there can be no doubt that at least a part of the section, as it appeared in the Compiled Statutes of 1901, was valid. Under the conditions above recited the legislature might well have supposed the whole section constitutional. It became section 24, subd. XIV, ch. 79, Comp. St. 1893. In 1903 the legislature, regarding the section valid as it appeared in the Compiled Statutes (for we must uphold acts of the legislature if it is reasonably possible to do so), enacted a statute entitled "An act to amend section twenty-four of subdivision fourteen, chapter 79, Compiled Statutes of Nebraska, and to repeal said original section." Laws 1903, ch. 94.

The purpose of the constitutional provision in question is to prevent surreptitious legislation; to enable all members of the legislature to know from the title of the proposed law what general subject it is intended to legislate upon. Would the fact, if it were a fact that some part of the section named in the title of the act of 1893 might by strict construction be found unconstitutional, prevent the lawmakers from taking notice that it was intended to legislate upon the general subject of the section as it appeared in the authorized compilation of the laws? We do not think we ought to give such a meaning to the rule announced in *Miller v. Hurford*, *supra*. If the title is such that it must necessarily call attention to the general subject of the proposed legislation, it cannot be said that the subject is not expressed in the title, if the purpose of the constitutional requirement and the evil it was designed to remedy is considered. The amendment of 1903 was germane to the section of the Compiled Statutes named in the title, within the meaning of the rule in *Miller v. Hurford*. The section so amended is now substantially the section being considered and does not violate the constitutional requirement in question.

2. The abstract contains the published notice of the election, from which it appears that the proposition submitted was: "Shall the board of education of said district have power to borrow money and pledge the property of said district upon its bonds, and to issue and negotiate said bonds in the sum of \$350,000, to be used" for three several purposes. The first purpose stated in the notice was "erecting and completing a high school building," and the notice stated that this building was "to be located on the place and upon the site to be selected by the electors at said election." The notice further stated that there would be two places voted upon, and the places were specified in the notice. The second purpose for which the proceeds of the bonds were to be used, as stated in the notice, was "for erecting and completing one grade school building," and the notice specified where that building should be located. The third purpose stated in the notice was for an annex to the Saratoga school building, stating the location of that building. The form of the ballot used is not shown in the abstract, and we have no other information as to the manner in which the proposition was submitted, except as indicated in the published notice. It is no doubt true that, when a proposition to issue bonds is submitted to the voters, it must be submitted "*in such manner as to enable the voters intelligently* to express their opinion upon it, and for that purpose the proposition should be submitted to them separate and distinct from any other proposal which is not germane to the question upon which a vote is desired." 2 Dillon, Municipal Corporations (5th ed.) sec. 891. This does not mean that it must be submitted at a separate election at which no other question or matter is submitted, and there is no such requirement in the statute. No objection is made to the form of the ballot, and it must be presumed to be sufficient in that respect. It is urged that the board was not authorized to submit the question of selecting sites for the buildings, and that some voters in the vicinity of the proposed locations might be in-

fluenced thereby and so vote upon the issuance of the bonds, which otherwise they would not do. It is suggested that, if such proceeding is allowed, the board might designate a large number of sites and unduly influence the adoption of the proposition. No precedent is cited for avoiding upon such grounds an election otherwise duly held. This question so submitted involved only the choice between the site of the present high school building and another proposed location, and it seems impossible that this could have improperly influenced the voters.

3. The objection that there were no voting places provided in the territory outside of the city limits does not seem to require that the election should be declared invalid. The evidence shows that this has been the customary way of voting at school district elections, and it appears to have been generally understood that the voters in the district outside of the city should vote at the polling places in the city nearest to their respective residences. At all events, there is no evidence that any elector was prevented from voting in this election, and the voters themselves are not now complaining. It seems that this objection is not well taken.

4. The final contention is that the publication of the notice of this election was insufficient. The notice was published in the "Trade Review," a weekly paper published in the district. It was also published in two of the daily papers published in the city of Lincoln. This publication in the daily papers was apparently not relied upon as a legal publication. The abstract shows that a witness who was examined as to the publication of these notices testified "that he would not say the notice published in the Star and Journal (the two daily papers) were published as much as 20 days before the election," and that there was only one publication of the notice in these papers. This evidence does not show that the publication in the Trade Review was insufficient. The statute requires that the notice "shall be given for at least 20

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days in one or more papers published within the district." The notice therefore in the Trade Review for more than 20 days prior to the election was sufficient.

These considerations require that the judgment of the district court be

AFFIRMED.

BARNES, FAWCETT, and LETTON, JJ., concur in the conclusion in the opinion by HAMER, J., and in the syllabus and reasoning in the concurring opinion by SEDGWICK, J.

T. M. PARTRIDGE LUMBER COMPANY, APPELLANT, v. PHELPS-BURRUSS LUMBER & COAL COMPANY, APPELLEE.

FILED MAY 13, 1912. No. 16,695.

1. **Compromise and Settlement: TENDER: ACCEPTANCE.** "Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary." *Treat v. Price*, 47 Neb. 875.
2. ———: **CONSIDERATION.** "When there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

Charles S. Roe, contra.

REESE, C. J.

This action was commenced before a justice of the peace. The amount of plaintiff's claim is \$95.60. The case was appealed to the district court, where a trial was had to the court which resulted in a finding that there had been an accord and satisfaction, and a judgment dismissing the case. Plaintiff appeals to this court.

The action is founded upon the sale of a car-load of cedar telephone poles, the price of which was \$570.30 delivered in Lincoln. Defendant paid \$150.80 freight charges, and remitted \$323.90, making a total of \$474.70. One of the principal issues presented by the pleadings was whether there had been an accord and satisfaction of the demand. The correspondence between the parties shows that the poles were warranted to be up to certain specifications as to size and quality, that plaintiff insisted upon an inspection before shipment, and defendant insisted upon inspection at the point of delivery. The poles were shipped, and upon their arrival in Lincoln they were inspected and some were rejected. There was a dispute as to the right of defendant to inspect the poles at Lincoln and also as to the quality of the poles shipped. On January 11, 1908, defendant sent plaintiff a check for \$323.90, accompanied by the following letter:

"Inclosed herewith find check for \$323.90 from the Phelps-Burruss Lbr. & Coal Co. in settlement with the Nebraska Telephone Co. for car of white cedar poles which you shipped in car M. & I. No. 1127.

"53 7" top 25' white cedar poles @	\$2.63.....	\$139.39
34 7" " 35' " " " "	8.25.....	\$280.50
3 6" " 20' " " " "	1.38.....	\$ 4.14
9 7" " 30' " " " "	5.63.....	\$ 50.67
		<hr/>
		\$474.70
Less freight		\$150.80
		<hr/>
		\$323.90

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"The following is a list of the poles rejected and are here on hand subject to your order:

"4—7" top 25' white cedar poles.

7—7" " 35' " " "

"The above rejected poles are all dead timber as per report made by the Nebraska Telephone Co., and are therefore worthless as telephone poles, and are not admissible by the Northwestern Cedarmen's Association grading rules. (Signed.)

"P. S. The above rejected poles are here in the Phelps-Burruss Lbr. yard subject to your inspect and order."

The check was received and the money retained by plaintiff, but a letter was sent defendant saying that it was not received in full payment, but on account, and that an inspection of the rejected poles would have to be made by an officer of the association of which plaintiff appears to have been a member. An inspector came from Des Moines, looked over the rejected poles and reported to plaintiff, but the report was not entirely satisfactory owing to there being some poles upon which the brand or hammer mark of plaintiff did not appear. It cannot be fairly contended, we think, that plaintiff did not understand that the \$323.90 was sent in full satisfaction of all demands. If so, one of two courses was open to it—either retain the money as a full satisfaction, or return the check and sue for the whole amount claimed to be due. It chose the former course. Having retained the money, the stated purpose of the sender would control.

In *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334, we said, that if there was a disputed account, "and the defendant tendered a less amount in full settlement and discharge of the entire claim, and defendant (plaintiff?) accepted the money with the knowledge that it was so paid, the dispute is a sufficient consideration to uphold the settlement and will bar a recovery."

In *Treat v. Price*, 47 Neb. 875, we said: "When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receives

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it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may at that time or afterwards make to the contrary."

The decision of the district court is supported by sufficient evidence, and the judgment is

AFFIRMED.

**CHARLES P. BRESEE, APPELLEE, v. ROSE EVER ORMSBY,
APPELLANT.**

FILED MAY 13, 1912. No. 16,710.

1. **Appeal: OBJECTIONS TO PROCEDURE.** When a cause involving equitable principles is appealed to the supreme court, the appeal based upon the merits of the whole case, all objections to the procedure on appeal should be made and presented by motion or otherwise, and not withheld until the filing of the briefs on final submission.
2. **Mortgages: FORECLOSURE: SALE: EFFECT OF CONFIRMATION.** In the absence of fraud, the confirmation of a sale made by a sheriff upon a foreclosure of a mortgage cures all defects in the proceedings of the sheriff thereunder subsequent to his receipt of the order of sale.
3. ———: ———: ———: ———. A husband, named George Mead, was made a party to a foreclosure suit. His wife was also named as "Mrs. Mead, his wife, first name unknown." Neither appeared, and a default was duly entered against them and decree of foreclosure rendered, the husband being, upon sale and confirmation, divested of any title he may have had. After confirmation of the sheriff's sale, a deed was made to the purchaser, who took possession, exercising acts of ownership and paying taxes. A short time before the commencement of this suit, the plaintiff, for a nominal consideration, obtained a quitclaim deed from Mead and wife, and brought this suit to quiet his title, basing his claim upon the inchoate right of dower of Mead's wife. *Held*, That this suit could not be maintained.

APPEAL from the district court for Cherry county:
WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

William C. Brown, for appellant.

Andrew M. Morrissey, Allen G. Fisher and William P. Rooney, contra.

REESE, C. J.

This action was commenced in the district court for Cherry county September 11, 1908, in ejectment. It is alleged in the petition that on or about January 1, 1902, defendant unlawfully entered the premises, and has ever since held and enjoyed the rents and profits thereof, etc. A judgment for possession and damages was demanded. To this petition defendant, on September 30, filed her answer in general denial. On November 24 plaintiff filed his amended petition, by which he changed his action to one to quiet title, alleging the ownership and possession of the real estate, which is described as the south half of the northwest quarter of section 22, and the south half of the northeast quarter of section 21, in township 35 north, range 29 west of the sixth principal meridian, in Cherry county; that defendant claims to be the owner of the land in her own right; that her claim is founded on a purported mortgage for the sum of \$250 dated February 15, 1893, but the execution of which is denied; that a cause of action on said purported mortgage arose, if ever, not later than June 4, 1893; that no action thereon was commenced at any earlier date than June 4, 1903, and that the mortgage was barred by limitation. It is alleged that on March 21, 1901, and a long time prior thereto and afterward, Sarepta L. Mead had an inchoate dower right as the wife of George Mead, owner of the title of record; that she was never made a party to any foreclosure suit, nor appeared therein, and that all proceedings against her were void for want of jurisdiction. The plaintiff offers to do equity by the payment of any sum of money the court

may find due defendant. The petition contains an obscured averment that the mortgage, sparingly referred to above, was foreclosed, a decree of foreclosure entered, but for more than the amount due, and that by various defects in the proceedings the foreclosure, including the sheriff's sale and conveyance to defendant, was void. The prayer is that plaintiff's title be quieted.

An answer to the amended petition was filed consisting of various denials and admissions which took issue with the averments of the amended petition. It is admitted that the inception and foundation of defendant's ownership of the land in dispute was the mortgage and its foreclosure referred to in the amended petition. The assignment of the mortgage and debt to her, the foreclosure, sale, confirmation, and conveyance by the sheriff under the order of sale are alleged, and that therefore her title is complete. The reply is a general denial.

A trial was had to the court, which resulted in a finding and decree in favor of plaintiff, canceling defendant's deeds and record of the foreclosure, quieting plaintiff's title, and enjoining defendant from interfering with plaintiff's possession. Defendant appeals.

A number of objections are made to the procedure taken by defendant on this appeal, extending from the settlement of the bill of exceptions by the district judge to the final presentation of the case here, but as none of them were raised by motion or otherwise, and are suggested for the first time in the briefs, they will not be noticed, and, as nearly as this record will permit, the case will be disposed of on its merits.

The notes and mortgage upon which the foreclosure proceedings were had bear date of February 15, 1893, and by their terms matured on the 1st day of December, 1897, the interest, at the rate of 7 per cent., being payable semi-annually on the first days of June and December of each year. Default being made by the mortgagor in the payment of both interest and taxes, the defendant, assignee of the notes and mortgage, brought suit to foreclose the

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mortgage, her petition and affidavit of the nonresidence of the defendants being filed March 21, 1901. The proceedings to obtain jurisdiction seem to have been regularly taken. A decree of foreclosure was entered ordering the land to be sold. The sheriff made the sale and submitted his report to the court, when the sale was confirmed and deed ordered. Objection is made to the order of confirmation on the ground that the sheriff did not give sufficient notice of the sale. With this question we have nothing to do in this collateral proceeding, as the order confirming the sale cured all defects and irregularities in the proceedings under the order of sale, if any existed. *Phillips v. Darley*, 1 Neb. 320; *McKeighan v. Hopkins*, 14 Neb. 361; *Neligh v. Keene*, 16 Neb. 407; *O'Brien v. Gaslin*, 20 Neb. 347; *Wilcox v. Raben*, 24 Neb. 368; *Watson v. Tromble*, 33 Neb. 450; and many other cases which might be cited. We therefore treat the foreclosure proceedings as valid as against all parties to that action.

Plaintiff's alleged right is founded on a conveyance of the land in question to him from George Mead and Sarepta L. Mead, dated April 29, 1908, for the expressed consideration of one dollar and other valuable consideration. We are unable to find in the record any proof of what right or title the grantors ever had in the land, whether a title either legal or equitable, or a lien, by mortgage or otherwise. In the petition for the foreclosure of defendant's mortgage it was alleged that "the defendants, George Mead and Mrs. Mead, his wife, first name unknown, * * * have or claim to have some interest in, or claim upon, said mortgaged premises, but such interest or claim, if any they have, is junior and subject to the claim of plaintiff." In the affidavit of nonresidence the names of "George Mead, and Mrs. Mead, his wife, first name unknown," are referred to as defendants, and in the published notice they are notified in the same way. It is shown in the decree of foreclosure that the court found that due and legal notice of the filing and pendency of the

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action had been given them, and upon "being three times solemnly called in open court," and still failing to answer, demur or otherwise plead, a default was entered against them, with the resulting decree of foreclosure. This, with the subsequent proceedings, presumptively extinguished the right of George Mead, whatever that right might have been. We do not find it necessary to decide as to what effect it had upon the rights of his wife. If we assume that it had none, and we further assume that George Mead, her husband, had the legal title to the land prior to the foreclosure, and his wife, as alleged in the amended petition, "owned and had in said real estate an inchoate dower right, as the wife of George Mead, owner of the title of record, and in fact," this would not confer on her, or any one to whom she might assign that inchoate right during the life of her husband, any title, and therefore neither she nor her assignee could maintain this action. However, the evidence leaves us in the dark as to what interest Mead ever had in the land. The confirmation of the sheriff's sale under the foreclosure was entered on the 4th day of October, 1901, and the sheriff's deed was made on the 24th of the same month and recorded the 4th of November of the same year. Since that time defendant has paid the taxes, and has, at times at least, exercised ownership over the land, being, as alleged in the original petition, in the possession of the property.

We have given this record as careful study and examination as we could, and are unable to find any equity in favor of plaintiff.

The decree of the district court is therefore reversed and the cause remanded to that court, with directions to vacate the decree in favor of plaintiff, and to enter a decree dismissing the action at his costs.

REVERSED.

LETTON, J., not sitting.

Kaylor v. Kelsey.

FRANK H. KAYLOR, APPELLANT, v. S. B. KEISEY ET AL.,
APPELLEES.

FILED MAY 13, 1912. No. 16,698.

1. **Mortgages: VOID FORECLOSURE: RIGHTS OF SUBSEQUENT GRANTEE.**

One who takes possession of real estate under mesne conveyances from a purchaser at a void foreclosure sale of a valid mortgage is entitled to all of the rights of a mortgagee in possession.

2. ———: ———: **RIGHTS OF GRANTEE OF MORTGAGOR.** Where a valid

mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceeding without offering to pay the amount of the decree and interest. *Stull v. Masilonka*, 74 Neb. 309

APPEAL from the district court for Dundy county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Ralph D. Brown and Glenn N. Venrick, for appellant.

C. E. Eldred and C. H. Boyle, contra.

BARNES, J.

Action in ejectment to recover the possession of the south half of the south half of section 17, township 2, range 36 west of the sixth P. M., in Dundy county, Nebraska. The petition contained two counts. One for the possession of the premises, and the other for the rents and profits thereof from the year 1906 to the commencement of the action. The answer, in addition to a general denial, contained allegations sufficient to constitute the equitable defense available to a mortgagee in possession. The reply was a general denial. The cause was tried to the court without a jury. The trial resulted in a general finding and a judgment thereon for the defendant, and the plaintiff has appealed.

To secure a reversal plaintiff relies upon the single assignment that "the judgment is contrary to the evidence and the law applicable thereto."

Kaylor v. Kelsey.

It appears from the record that the plaintiff, then an unmarried man, was the owner of the land in question; that in the year 1888, for the consideration of \$500, he executed a mortgage thereon, and immediately thereafter abandoned it; that since that time he has paid no taxes thereon; that he failed to pay either interest on the mortgage debt or the principal thereof, and on the 14th day of March, 1893, one Nancy E. Smith, as trustee, commenced an action in the district court for Dundy county to foreclose the mortgage; that service of summons was made by publication only; that the plaintiff herein, who was made a defendant in that action, then resided in Chase county, in this state; that he made no appearance, and such proceedings were had that a decree of foreclosure was entered therein, the property was thereafter sold under the decree to Nancy E. Smith, and upon confirmation of the sale a sheriff's deed was executed to her therefor. After receiving her sheriff's deed the purchaser paid the taxes from year to year, and finally leased the premises to one J. B. Stroup for the year beginning March 1, 1904, and ending March 1, 1905; that Stroup took possession of the premises under the written lease, fenced the same and occupied the land until his landlord sold and conveyed it by special warranty deed to one Lars Johnson; that Johnson, on the 26th day of September, 1905, sold and conveyed the same by deed of warranty to one Samuel Breden, who took possession thereof, and on the 7th day of May, 1906, sold and conveyed the same by deed of warranty to the defendant S. B. Kelsey, who was in possession at the time this action was commenced.

The plaintiff testified that he had not sold or conveyed the land to any one; that after the foreclosure he supposed it was gone, and paid no attention to it until he was induced to bring this suit by one I. R. Darnell, who agreed to pay the costs, to hold the plaintiff harmless, and see that the suit did not cost him anything in consideration of receiving one-half of the results of the litigation.

It may be stated at the outset that the record suffi-

ciently shows that the decree of foreclosure was void for want of service, and therefore it will be assumed that the general finding for the defendant was founded upon the fact that he occupied the position of a mortgagee in possession, and plaintiff was not entitled to possession of the mortgaged premises until he had paid the mortgage debt. It is strenuously argued that the evidence shows that the purchaser at the foreclosure sale did not take immediate possession of the mortgaged premises, and does not show that she ever took possession thereof, and that a conveyance by a mortgagee, not in possession, does not operate as an assignment of the mortgage debt. It may be conceded that, if the defendant cannot successfully assert the rights of a mortgagee in possession, the judgment must be reversed. But to our minds the record contains sufficient evidence to support the finding that, at the time the purchaser at the void judicial sale conveyed the premises to her immediate grantee, she was in actual possession by and through her tenant, and her conveyance operated as an assignment of the mortgage debt. It follows that each subsequent conveyance of the premises, up to and including the deed to defendant Kelsey, under which he took possession of the premises, had that effect. *Currier v. Teske*, 82 Neb. 315. It being conceded that he was in possession when the action was commenced, he therefore occupied the position of a mortgagee in possession. The rule is well settled in this state that in such case the mortgagor will not be entitled to possession of the mortgaged premises until he has paid the amount of the void foreclosure decree with interest. In *Stull v. Masilonka*, 74 Neb. 309, it was said: "Where a valid real estate mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceedings without offering to pay the amount of the decree and interest." The rule thus announced was followed and approved in *Currier v. Teske*, *supra*. In the case at bar it is not

claimed that the plaintiff ever offered to pay the amount of the void foreclosure decree with interest thereon, or the taxes paid by the defendant and his grantors.

It follows that the judgment of the district court was right, and it is therefore

AFFIRMED.

**LEWIS H. SCHERZER, APPELLEE, V. LINCOLN TRACTION
COMPANY, APPELLANT.**

FILED MAY 13, 1912. No. 17,070.

1. **Electricity: STREET RAILWAYS: MAINTENANCE OF ELECTRIC WIRES: LIABILITY.** The right to construct and maintain an overhead trolley wire carrying a deadly current of electricity across the tracks of a steam railroad imposes upon those having such privilege the duty of so managing affairs as not to injure persons lawfully operating the trains of the railroad company.
2. **Street Railways: MAINTENANCE OF ELECTRIC WIRES: INJURY: PRESUMPTION OF NEGLIGENCE.** An injury to an employee of the railroad company from contact with such an overhead trolley wire affords a presumption of negligence, and requires the party maintaining the structure to show that the dangerous condition of its wire was caused by some unforeseen act or agency beyond its control.
3. **———: ———: ACTION FOR NEGLIGENCE: DEFENSES.** A release of the railroad company by the injured employee in consideration of the payment of wages and a small gratuity given the injured person, where no liability existed upon the part of the railroad company, is not a defense to an action against the party causing such injury.
4. **Instructions examined and approved.**

**APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.***

C. S. Allen, for appellant.

Greene & Greene, contra.

BARNES, J.

Action to recover damages for personal injuries sustained by the plaintiff by coming in contact with the overhead trolley wire of the defendant where its track crosses the line of the Chicago & Northwestern Railway Company on North Fourteenth street in the city of Lincoln. The cause was tried to a jury in the district court for Lancaster county, where the plaintiff had the verdict and judgment, and the defendant has appealed.

The appellant contends that the verdict is not sustained by the evidence. The abstracts disclose, without dispute, that in the spring of 1887 the Chicago & Northwestern Railway Company built its railroad across Fourteenth street in the city of Lincoln, and in the year 1891 the defendant constructed its street railway, consisting of tracks, poles and an overhead trolley wire upon and along North Fourteenth street, across the railroad tracks, for the purpose of transporting passengers to and from the Nebraska state fair; that for about a week before and after that event the defendant company uses its track on North Fourteenth street for that purpose, and that for the remainder of each year that part of its system is used very infrequently, if at all; that up to the 18th day of October, 1909, the defendant had maintained its overhead trolley wire where it crosses the railroad tracks at a sufficient height to enable the employees of the Northwestern company to safely operate its trains by riding, as it was necessary for them to do, upon the top of its largest freight cars; that on the day above mentioned, at about 7 o'clock in the evening, the plaintiff, while properly performing his duties as yardmaster of the Northwestern company, and while riding upon top of a box car in one of the company's trains of cars, was struck by the defendant's overhead trolley wire, which for some cause, not fully shown by the record, had sagged at the place of crossing sufficiently to allow it to strike the plaintiff in the face; that his face, mouth and tongue were cut and

bruised, some of his teeth were broken or destroyed; that he was badly burned by contact with defendant's live trolley wire, and thereby sustained severe injuries. It appears that it was dark at the time the accident occurred, and plaintiff could not see the condition of the trolley wire. It further appears that frequently for several years before that time, and once upon that day, plaintiff had passed under this wire, while riding upon one of the highest freight cars in use by the railroad company, without injury or danger, and therefore had the right to assume that the wire was still in its former position. There was some testimony introduced which tended to show that the next morning after the accident occurred the wire was sagged at that point, and hung from six inches to one foot below the place where it had theretofore been maintained. Plaintiff also testified that he noticed that the supporting poles looked old and weak.

Defendant argues, upon the foregoing facts, that plaintiff cannot invoke the rule *res ipsa loquitur*, or, in other words, that negligence on its part is not to be presumed. Section 1, ch. 26a, Comp. St. 1911, provides in part that all persons, associations, and corporations engaged in the generating and transmitting of electric current for sale in this state for power or other purposes are hereby granted the right of way for all necessary poles and wires along, within and across any of the public highways of this state. It further provides, among other things, that all such wires shall be placed at least 20 feet above all road crossings, and that all such poles and wires shall be so placed as not to interfere with the public use of any such highways; that such wires shall in no case be maintained at a less height than 27 feet above the top of the rails of any railroad tracks. It also provides that nothing contained in that section shall be construed to grant any rights within the corporate limits of any village or city of the first and second class or of the metropolitan class in this state. The record contains no ordinance or ordinances of the city of Lincoln relating to that subject.

Therefore, in the absence of direct statutory provisions, we are compelled to resort to the rule of the common law in such cases in order to determine this question.

In 1 Joyce, *Electric Law* (2d ed.) sec. 409, it is said: "The fact that a street railway is a proper street use will not entitle it to so construct its line across the tracks of a steam railroad as to substantially interfere with or obstruct the latter in the enjoyment of its rights." It was said by the court in a case in Connecticut that a steam railroad "holds its right of way charged with the performance of a public trust for its continuous use for public accommodation. * * * Its railroad is a great avenue of communication between one part of the state and another, and between this and other states. Any impediment to its safe and proper use is a matter of public concern, not to be measured by money, or dealt with on the footing of a claim for damages." *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 5 Am. Elec. Cas. 246. So, where it is proposed to construct an overhead trolley across the tracks of a steam railroad, the wires should be suspended at sufficient height to permit the free operation of the railroad. *Erslew v. New Orleans & N. E. R. Co.*, 49 La. Ann. 86, 21 So. 153.

Proper construction alone does not meet the full duties and obligations imposed upon the traction company in such case, but such duty extends to the proper maintenance thereof at all times. "Entirely apart from the fact that the wires may be charged with a dangerous current, the fact that such a structure is set up in a public street, even though duly authorized, involves the obligation to take care that it shall be constructed of good materials, in a substantial manner, so as to withstand all strains that may reasonably be anticipated, and that it shall be maintained in good repair." Keasbey, *Electric Wires* (2d ed.) sec. 233.

In *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, the court said: "The general rule is that the occurrence of the accident does not raise the presumption of negli-

gence, but where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense." It has been held in other cases that from the happening of such accident, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the defendant of showing ordinary care.

In the notes to *Western Union Telegraph Co. v. State*, 31 L. R. A. 572, 576 (82 Md. 293), it is stated: "The construction and maintenance of electric lines in the highways being a matter wholly under the control and care of the parties building them, and the maintenance being wholly under the care of the parties owning them, the court usually holds that the fact of an electric wire falling or sagging into the street in such a way as to obstruct travel, and cause injury, is *prima facie* evidence of negligence on the part of the company."

In 2 Joyce, *Electric Law* (2d ed.) sec. 608, it is said: "We have already stated in a prior part of this work that it is the duty of electrical companies, whose wires are suspended along or across the streets and highways, to string them in such a manner as not to interfere with or obstruct public travel. If a traveler who is free from contributory negligence is injured by contact with wires stretched along or across a public highway he may recover from the company maintaining such wires, for the injury."

It appears that the box car upon which the plaintiff was riding at the time he was struck by the defendant's trolley wire was approximately 13 feet and 6 inches high, that the plaintiff was 6 feet in height, and it would thus seem clear that defendant's wire by which he was struck and injured was only about 19 feet above the railroad track; therefore it may be reasonably inferred from the undisputed facts of this record that the height at which the defendant constructed and maintained its trolley wire was insufficient to enable the railroad company to operate

its trains with safety to its employees. We are therefore of opinion that the plaintiff made a case which called for explanation on the part of the defendant, and it was incumbent upon it to show that it had constructed and maintained its wires at a suitable and sufficient height, or that the accident was caused by the happening of some event beyond its control, and was not caused by its negligence. It follows that the defendant's contention upon this point should not be sustained.

Defendant further contends that the undisputed testimony shows that the plaintiff accepted the sum of \$50 from the railroad company in satisfaction of the damages he had suffered by the accident upon which this suit is based, and that such payment and satisfaction operated to release the defendant from liability in this case. Upon this question the evidence discloses that the payment made to the plaintiff, for which the release in question was given, included his wages during the time he was unable to perform his labors as yardmaster, and the sum of \$20 to enable him to have his teeth repaired, which it is claimed was given to him as a mere gratuity on the part of the railroad company. Plaintiff also testified that it was never his intention by the acceptance of this money to release his claim against the defendant. Appellant's argument proceeds on the theory that the railroad company was a joint tort-feasor with the defendant, and, if this were true, defendant's contention would be well founded. As we view the record, it contains nothing which shows or tends to show that the railroad company was guilty of any negligence which contributed to defendant's injury. It is suggested that it was the duty of the railroad company to have erected guards, or what may be called a whip-lash warning signal at a suitable distance from and on each side of the street-crossing in question, for the purpose of warning its employees to avoid being struck by defendant's trolley wire. It would seem that there is no merit in this suggestion, for it was the duty of the defendant to erect and maintain its wires in such a manner

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as to in nowise interfere with the safe operation of the railroad company's trains at the point in question; and not only plaintiff but the railroad company as well had the right to presume that the defendant had suitably performed its duty in that behalf. We are therefore of opinion that the payment and release in question in no way inured to the benefit of the traction company.

Finally, it is contended that the court erred in giving paragraphs 7, 8 and 9 of its instructions to the jury. An examination of the instructions complained of satisfies us that they are in accord with the views heretofore expressed in this opinion, and afford no basis for a reversal of the judgment.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

EMMA HILL, APPELLEE, v. A. HOSPE COMPANY, APPELLANT.

FILED MAY 13, 1912. No. 17,076.

Appeal: AFFIRMANCE. Where a judgment of the district court responds to the issues raised by the pleadings, and appears to be just as between the parties, a court of review may disregard any error in the pleadings or proceedings which does not affect the substantial rights of the appellant.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed on condition.*

R. H. Hagelin, for appellant.

George A. Adams, contra.

BARNES, J.

Action for damages alleged to have been sustained by plaintiff for a breach of contract for the sale or exchange

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of pianos. The plaintiff was successful in justice court, and on appeal to the district court she had the verdict and a judgment for \$150. To reverse that judgment the defendant has brought the case here by appeal.

By her petition the plaintiff alleged, in substance, that on or about the 5th day of June, 1908, she was the owner of a Brewster piano of the value of \$250; that on or about that day the plaintiff purchased of and from the defendant a certain piano which was shown and exhibited to her, and for which she agreed to pay the sum of \$475; that as part payment for said piano the defendant agreed to, and did, accept of her the Brewster piano; or, in other words, the plaintiff traded her piano to the defendant for a piano recommended to be a new, well-made, well-tuned, fully-equipped in every way, and a good-sounding first-class piano; that plaintiff turned over to the defendant her Brewster piano, and she gave her obligation to pay the balance at \$8 a month to the defendant; that defendant showed the plaintiff a piano which they said was a new, well-built, well-tuned, and in every respect a perfect instrument, and guaranteed it to be first-class in quality, make and style; that defendant, instead of delivering to plaintiff a first-class and well-tuned, well-built, well-constructed, and first-class piano, delivered to her and placed in her home a comparatively worthless, old, patched-up, injured, damaged and worthless piano; that plaintiff relied upon the defendant's representations of the piano so traded for and purchased by her, and, relying upon said representations and guaranty, made said trade; that after plaintiff learned the character and condition of the piano she refused to make payments thereon, and ordered defendant to take back the same and furnish a piano in accordance with the contract; but the defendant wholly failed and refused so to do, and thereafter brought a replevin suit, and took from plaintiff the old, out-of-repair and out-of-date, and comparatively worthless piano, and defendant now has both of said pianos, all to plaintiff's damage in the sum of \$200, for which she prayed judgment.

For answer to the petition the defendant alleged that on or about the 2d day of June, 1908, it sold and delivered to the plaintiff one Cable-Nelson piano at the agreed price of \$375, and took as part payment therefor one old Brewster piano, and allowed the plaintiff, for the purpose of said sale, the sum of \$200 therefor; that plaintiff and defendant, on that day, entered into a contract of conditional sale by which the plaintiff was to pay the balance of the purchase price at the rate of \$8 a month; that the title to the Cable-Nelson piano was to remain in the defendant until the purchase price had been paid; that after entering into the contract of conditional sale the defendant discovered that one William Wiseman held a chattel mortgage on the Brewster piano for the sum of \$50, and at plaintiff's request the defendant paid the said mortgage and secured a release thereof; that thereupon, on the 5th day of June, the plaintiff and the defendant entered into a new contract of conditional sale for said Cable-Nelson piano for the sum of \$425, which included the purchase price for the Brewster piano and the \$50 paid by the defendant to discharge the mortgage debt aforesaid; that the contract for the conditional sale provided that plaintiff was to pay the balance of the purchase price, including the \$50 paid to discharge the mortgage lien, at the rate of \$8 a month, and that the title to the said Cable-Nelson piano should remain in the defendant until the balance had been paid in full. It was further alleged that plaintiff failed and refused to make the payments, though frequently urged and requested so to do, and that on or about the 29th day of December, 1908, the defendant instituted a replevin suit in the justice court of Lancaster county, and on the 15th day of February, 1909, a judgment was duly rendered in favor of the defendant for the possession of the Cable-Nelson piano. Defendant therefore prayed that it go hence without day and recover its costs, and for a judgment against the plaintiff for \$50, the sum paid to release the mortgage on the Brewster piano, with interest thereon at the rate of 7 per cent. per

annum, and for costs of suit. The reply was, in substance, a general denial. Upon the trial of the issues thus joined the plaintiff had judgment as above stated.

Appellant first contends that the court erred in receiving the testimony of one A. M. Bartram and one P. B. Eno, relating to the value of what is called the Cable-Nelson piano, and argues that the witnesses had not shown themselves competent to testify upon that subject. It would seem that this testimony was improperly received for two reasons: First, the value of the Cable-Nelson piano was not the matter at issue; second, it does not appear that the witnesses were qualified to testify as to the value of the piano. It seems clear, however, that this evidence did not prejudice the defendant, and for that reason its admission does not require a reversal of the judgment.

Defendant's second contention is that the court erred in refusing to strike out the answer to a question contained in the deposition of Beulah Hill, describing the condition of the Cable-Nelson piano. We think this testimony was both relevant and material, as tending to prove that the piano furnished plaintiff was not the one she examined at the defendant's place of business, and for which she had agreed to exchange her Brewster piano.

It is next contended that the court erred in refusing to strike the testimony of this witness relating to statements made by the party who called on the plaintiff to collect the instalments due upon her contract. It is argued that the testimony does not show that this person was an agent or employee of the defendant company. We think, on the whole, the evidence fairly tends to show that the person who sought to make the collections was the agent of and represented the defendant, and the motion to strike was properly overruled.

Error is assigned for refusing and giving certain instructions. We think there is no merit in this assignment. As we view the record, the instructions given in no way prejudiced the defendant's rights, and those refused would not have produced a different verdict.

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Finally, it is contended that the verdict is not sustained by the evidence, and is contrary to law. An examination of the record satisfies us that, if the plaintiff and her witnesses were to be believed, she was entitled to recover; and, on the other hand, if the defendant's evidence is taken to be true, then the defendant should have had the verdict. It thus appears that the testimony was conflicting, and the verdict of the jury should not be set aside unless we can say it was clearly wrong.

It sufficiently appears, however, that the judgment of the district court was neither unjust nor inequitable. Therefore, the case is one where we should apply the provisions of section 145 of the code, which reads as follows: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Applying this rule, the judgment of the district court will be affirmed, if the plaintiff within 40 days from this date files a remittitur in this court for the sum of \$8.75, which represents the interest on the \$50 paid by defendant to release the mortgage on the Brewster piano, which the jury failed to include in their verdict. But, upon her failure to file such remittitur, the judgment of the district court will be reversed; and, in case of an affirmance, each party will be required to pay his own costs in this court.

AFFIRMED.

**ROY W. BURR, APPELLANT, V. ARTHUR G. FINCH ET AL.,
APPELLEES.**

FILED MAY 13, 1912. No. 16,650.

1. **Dower: NONRESIDENTS.** Under the statutes of Nebraska the dower of a nonresident of the state is limited to lands of which her husband died seized.

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2. **Process: CONSTRUCTIVE SERVICE: PUBLICATION OF NOTICE.** Notice to nonresidents, inserted in a weekly newspaper September 14, 21, 28, and October 6, 1899, was published "four consecutive weeks," within the meaning of section 79 of the code, providing that "the publication must be made four consecutive weeks in some newspaper."
3. **Evidence: GENUINENESS OF SIGNATURE.** In determining whether a notary's name was appended to a jurat with a rubber stamp, or written with pen and ink, the trial court, in a suit in equity, is not compelled to disregard the appearance of the name itself and accept as conclusive indefinite testimony that the name was printed with a rubber stamp.
4. **Taxation: FORECLOSURE OF LIEN: JURISDICTION.** In the district court, a county's foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, William P. Rooney and Andrew M. Morrissey, for appellant.

Albert W. Crites, contra.

ROSE, J.

This is a suit to redeem a quarter-section of land in Sheridan county from a tax foreclosure sale and to quiet title in plaintiff. The patent to the land was issued by the United States to John Auchampaugh January 2, 1895. The patentee and his wife executed and delivered to G. N. Anderson a warranty deed dated October 5, 1898, and recorded December 10, 1900. From the latter grantee and his wife, plaintiff claims title by quitclaim deed dated March 1, 1909, and recorded June 2, 1909. In a suit instituted by Sheridan county September 9, 1899, against the patentee and his wife, who were nonresidents upon whom service was made by publication, the land, pursuant to a decree foreclosing the county's lien for unpaid taxes, was sold by the sheriff to H. C. Cutler Decem-

ber 26, 1899. The sheriff's sale was confirmed December 29, 1899, and a sheriff's deed to the purchaser was executed January 2, 1900, and recorded January 4, 1900. Cutler, after his purchase, improved the land to the extent of \$1,100, deeded it to defendant Ervin Eddy by warranty deed dated July 16, 1908, and recorded August 4, 1908. For the consideration of \$2,500 Eddy deeded the land to defendant Arthur G. Finch by warranty deed dated December 17, 1908, and recorded January 2, 1909, and took from the purchaser a mortgage for \$1,500. Plaintiff claims title by mesne conveyances from the patentee, and defendants rely on mesne conveyances from the purchaser at the tax foreclosure sale. Under facts properly pleaded, the trial court denied relief to plaintiff, quieted in defendant Finch the title to the land, and confirmed the validity of the mortgage lien in favor of defendant Eddy. Plaintiff has appealed. Defendant Ervin Eddy died after the appeal was docketed in this court and the cause has been revived in the name of Helen Eddy as his successor in interest.

1. The first proposition argued, if correctly understood, is that the grantee of the patentee's wife has a right to redeem the land from the tax foreclosure because the sheriff's sale did not cut off the wife's inchoate right of dower. While the tax lien was being foreclosed the patentee and his wife were nonresidents, residing at Independence, Iowa. She is not entitled to redeem. Under the statutes of this state the dower of a nonresident is limited to lands of which her husband died seized. Comp. St. 1905, ch. 23, sec. 20; *Atkins v. Atkins*, 18 Neb. 474; *Miner v. Morgan*, 83 Neb. 400.

2. It is next asserted that the district court had no jurisdiction to foreclose the tax lien because the notice was not published four successive weeks as required by law. The statute provides: "The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed." Code, sec. 79. The publisher's affidavit states that the notice was pub-

lished in a weekly newspaper "four consecutive weeks, the first insertion in the issue of September 14, 1899, and the last insertion in the issue of October 6, 1899." The argument of plaintiff is that the weekly publications commencing September 14, had they been consecutive, as required by statute, would have appeared as follows: Thursday, September 14; Thursday, September 21; Thursday, September 28; Thursday, October 5; whereas the affidavit shows that the last publication was made one day too late, namely, Friday, October 6. It is clear that there were four publications in a weekly newspaper and that the fifth and sixth days of October were days of the same week. In *Davis v. Huston*, 15 Neb. 28, it was held that the language of the code means that the notice must be "inserted in a weekly newspaper once in each week for four weeks successively, and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive insertion." In *Medland v. Linton*, 60 Neb. 249, it was held that the word "week," in its legal significance, "means a period of time commencing on Sunday morning and ending on Saturday night." According to these decisions the publication, in respect to the dates and the issues of the weekly newspaper, complied with the statute.

3. The jurisdiction of the court in the foreclosure suit is also collaterally attacked because, as plaintiff asserts, it is shown that the name of the notary before whom the proof of publication purports to have been made was appended to the jurat with a rubber stamp. The testimony supporting this assertion is not direct and positive. The original affidavit was submitted to the trial court. It is in the record, and in it the name of the notary looks very much like a signature written with pen and ink. Over plaintiff's objections the trial court in this case held the notary's signature to be genuine and that finding is here adopted as correct.

4. Plaintiff further contends that the foreclosure was void for want of an antecedent administrative sale. It

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has often been held that "a county's foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction." *Mathews v. Gillett*, 90 Neb. 763, and cases cited.

No error has been pointed out, and the judgment is

AFFIRMED.

CONSOLIDATED FUEL COMPANY, APPELLEE, v. WILLIAM R. BROOKS ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 16,712.

Trade-Marks: INJUNCTION. A jobbing corporation which had established an extensive trade by purchasing a particular standard and preparation of coal from the South Canon Coal Company at Big Four, Colorado, where it is known as "Carbon Canon Coal," and by selling it to retailers by the trade-name of "Cristo Canon Coal," held entitled to an injunction to protect the use of that trade-name as against a former manager who engaged in the same business as a competitor and used "Cristo Canon" as a trade-mark for the same coal for the purpose of procuring trade which in the ordinary course of business would go to his former employer.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

T. J. Doyle and G. L. De Lacy, for appellants.

C. E. Abbott and Field, Ricketts & Ricketts, contra.

ROSE, J.

Plaintiff and defendants are rival jobbers in coal, and both assert the exclusive right to use in the trade the name "Cristo Canon" to describe fuel mined by and purchased from the South Canon Coal Company at Big Four, Colo-

rado, where it is known as the "Carbon Canon Coal." From a decree perpetually enjoining defendants from using the name in controversy for the purpose stated, they have appealed to this court.

The following propositions of law and fact are urged on behalf of defendants to defeat the injunction: Defendants invented the name. They were the first to register with the secretary of state "Cristo Canon" as a trade-name for coal, and a similar registry by plaintiff was afterward rejected. By using that name they did not attempt to sell their own coal as that of plaintiff. They did not perpetrate a fraud on the public, because they sold by the same name the same grade and quality of coal from the same mine. Plaintiff did not own the mine, or any interest in it, or control the output. Any wholesaler could buy the coal identified by plaintiff as "Cristo Canon" at the same mine from the same mining company and sell it to the trade. The name is both generic and geographical, and therefore plaintiff could not acquire the exclusive right to use it as a trade-mark.

Conceding the correctness of the foregoing propositions urged by defendants, for the purposes of this case, but for no other, it does not necessarily follow that the injunction was erroneously granted. The questions are: As between the parties to the suit, is plaintiff entitled to the exclusive use of the name? Are defendants in using the name perpetrating on plaintiff a fraud which equity will stop? Plaintiff had a right to buy coal of a particular standard and preparation from the South Canon Coal Company at Big Four, Colorado, where the coal is known as the "Carbon Canon Coal," label it "Cristo Canon" and sell it to retailers under that name, provided that in doing so the name had never before been used for that purpose, that there was no objection on the part of the mining company, and that plaintiff did not deceive, mislead or injure retailers or the public or interfere with any right of a competitor. The record justifies a finding that plaintiff so adopted and used the name. If the name is generic, or

geographical, facts not established, the right to thus adopt and use it nevertheless existed, though it might not be protected for all purposes. *Lee v. Haley*, 5 Ch. App. (Eng.) *155; *McAndrew v. Bassett*, 4 De G. J. & S. (Eng. Ch.) *380; *Amoskeag Mfg. Co. v. Spear & Ripley*, 4 Sandf. (N. Y.) 599; *Newman v. Alvord*, 51 N. Y. 189. Other competitors of plaintiff purchased the same coal at the same mine and sold it by other names of their own selection. Plaintiff's use of the name "Cristo Canon" has only been questioned or disturbed by defendants. As against them, was the injunction properly granted? Plaintiff is a corporation. When defendant Brooks was its manager, it created a large demand for coal to which it had given, with his consent, the trade-name in controversy. As a result it transacted an extensive business as a jobber. It was the exclusive source of all coal on the market by the name of "Cristo Canon." Its customers were pleased with the fuel. They praised its preparation and quality. After the character of the coal, designated in the trade by that name, and plaintiff's reputation for fair dealing had been established, Brooks left its employ at Fremont, promptly registered in his own name "Cristo Canon" as a trade-mark for coal, organized the W. R. Brooks Coal Company (defendant), started in business at Lincoln as a competitive jobber in plaintiff's territory, advertised to sell "Cristo Canon Coal," sent solicitors among plaintiff's customers, and, for the purpose of promoting his own enterprise, made use of his knowledge of plaintiff's territory, of its customers, of its business, and of the fact that other dealers bought and sold the same coal under different names.

Following the doctrine of the English courts of chancery, Vice-Chancellor Van Fleet stated the requisites for acquiring title to a trade-mark as follows: "First, the person desiring to acquire title must adopt some mark not in use to distinguish goods, of the same class or kind, already on the market, belonging to another trader; second, he must apply his mark to some article of traffic;

and, third, he must put his article, marked with his mark, on the market." *Schneider v. Williams*, 44 N. J. Eq. 391.

With these requisites plaintiff complied. While it did not own the mine or control the output, it owned the coal offered to the trade by the name "Cristo Canon." Defendants understood and participated in the means through which plaintiff built up its trade in, and created the demand for, fuel thus designated. The manifest purpose of defendants in using the name "Cristo Canon" and in pursuing the methods already described was to divert to themselves the benefit of plaintiff's reputation for honesty and fair-dealing and to procure trade which in the ordinary and legitimate course of business would go to plaintiff as a proper reward of rectitude and enterprise. Their competition was unfair and their conduct was a fraud on plaintiff. The registration of the name with the secretary of state was part of the fraudulent purpose and is no protection to defendants. In discussing the use of the word "Anatolia" as a trade-name for licorice, Lord Chancellor Westbury said: "There is the deliberate imitation of a mark previously existing in the market. The thing is done in order that the rival article of the defendants' manufacture may be brought into the market in competition with that which is already there. There is nothing, in a word, which is necessary for the interposition of the court which is wanting on the present occasion. But, it is urged on behalf of the defendants, this word Anatolia is a general expression; is, in point of fact, the geographical designation of a whole tract of country wherein licorice root is largely grown, and is therefore a word common to all, and in it there can be no property. That argument is merely a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes can not exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of licorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets cur-

rency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public. Lastly, it is urged on behalf of the defendants, with respect to the costs of this suit, that they were unwilling to contest the right of the plaintiffs. When they imitated the mark they knew that there was that mark in use, and they intentionally imitated it. It is probable that at the time they were not aware that it was the mark of the plaintiffs. But if a man finds an article sent to him from the market bearing a particular stamp, and he intentionally appropriates that stamp, and thenceforth uses it for the purpose of designating his own article, laying aside the mark that he had previously used, and appropriating that which he ought to have inferred was the property of another, he must take the consequences." *McAndrew v. Bassett*, 4 De G. J. & S. (Eng. Ch.) *380. In *Perry v. Truefitt*, 6 Beav. (Eng.) 66, Lord Langdale observed: "I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark." This doctrine has been recognized in a former opinion of this court. *Chadron Opera House Co. v. Loomer*, 71 Neb. 785. On principle, plaintiff's right to the name is exclusive as against defendants. *Newman v. Alvord*, 51 N. Y. 189; *Amoskeag Mfg. Co. v. Spear & Ripley*, 4 Sandf. (N. Y.) 599; *Lee v. Haley*, 5 Ch. App. (Eng.) *155.

The judgment of the district court is therefore

AFFIRMED.

SEDGWICK, J., concurs in conclusion.

MILTON R. WESSELL ET AL., APPELLEES, V. MANDEVILLE
HAVENS ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 17,023.

1. **Contracts:** CONSTRUCTION: SALES: GOOD-WILL. In a duly-executed, formal, written contract containing the terms under which a stock of general merchandise is sold, a provision that the good-will of the seller's mercantile business is included in the sale does not imply an agreement that the seller shall not re-engage in such business.
2. **Evidence:** PAROL EVIDENCE: ADMISSIBILITY. Where the good-will of a mercantile business is included in a duly-executed, formal, written contract of sale, without any restriction on the right of the seller to re-engage in the same business, oral evidence that he agreed not to do so is inadmissible as varying the terms of the written instrument.

APPEAL from the district court for Otoe county:
HARVEY D. TRAVIS, JUDGE. *Reversed with directions.*

J. C. Cook, John C. Watson and A. P. Moran, for appellants.

Pitzer & Hayward, Edwin Zimmerer and H. C. Maynard, contra.

ROSE, J.

Plaintiffs bought a stock of general merchandise and the good-will of the owners in an established mercantile business. This is an action to recover damages from the sellers for subsequently engaging in the same business as competitors of the buyers in alleged violation of the contract of sale. From a judgment in favor of plaintiffs for \$9,000, defendants have appealed.

Defendants owned and conducted a general store at Fremont. By written contract dated March 6, 1906, they agreed to sell their entire stock and the good-will of their business to plaintiffs. The agreement provided that an

invoice of the stock should be made by the parties as soon as possible; that the purchase price should be the amount of the invoice, after deducting 5 per cent. of the total; that plaintiffs should pay the consideration upon completion of the inventory; that for \$150 a month for two years, with an option for two years more, defendants should lease to plaintiffs the rooms in which the mercantile business was being conducted; and that the good-will of the sellers should be included in the sale of the stock. After a satisfactory inventory had been made by both parties, plaintiffs paid the stipulated consideration and accepted from defendants a duly-executed, formal, written bill of sale, containing the following terms:

"Know all men by these presents: That I, M. Havens and Laura Havens, of the county of Dodge, state of Nebraska, of the first part, for and in consideration of the sum of \$29,276.45, to me in hand paid by Wessel, Kohn & Co., of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, their executors, administrators, and assigns the entire stock of dry goods, millinery and ready-made goods and all articles of merchandise of whatsoever kind contained in my present place of business located on lots 3 and 4, block 143, in the city of Fremont. Goods sold are contained in the two-story and basement of said building, including all the store-fixtures of whatever kind. This to include also the good-will of the parties of the first part to go with the business belonging to me, and now in my possession, at the place last aforesaid."

The storerooms were leased according to contract. Plaintiffs took immediate possession of the leased premises and the purchased stock, and conducted a mercantile business at the same place until October, 1907, when they sold the remaining stock in bulk and retired. In the meantime defendant Mandeville Havens erected in the neighborhood of plaintiffs' store a new building, and defendant Laura L. Havens, his wife, opened therein, December 13,

1906, a suit store with an investment of \$3,800. Both enterprises were carried on harmoniously without interruption until plaintiffs retired from the mercantile business in Fremont. During that time plaintiffs did not complain that defendants, by opening and conducting a suit house, had violated their agreement, nor did plaintiffs present or mention a claim for damages for breach of the contract of sale, and friendly relations existed between plaintiffs and defendants. After plaintiffs sold their stock they sent from Nebraska City to defendants at Fremont \$150 to pay a month's rent for the storerooms which they had surrendered to their successors. Defendant Mandeville Havens went to Nebraska City, May 27, 1908, to make a further collection of rent, and was served with a summons in this case. Two days later a summons was served on his wife in Dodge county.

The original contract and the bill of sale are both pleaded in the petition. The agreements were executed. Under them defendants parted with their stock of merchandise and plaintiffs took possession of it. There was no dispute about the meaning of any term employed by the parties to express their agreements, or about any oral promise, until plaintiffs had resold all the property purchased. There is no allegation of fraud on the part of defendants in making the sale, or in formulating or executing the contracts. The contracts, though attached to the petition, do not contain a stipulation restricting defendants' right to re-engage in the mercantile business in Fremont while plaintiffs are engaged therein. Plaintiffs understood this, and pleaded: As a material consideration for the purchase and for the payment of the agreed price, defendants at the time orally promised and agreed not to engage in such business as competitors of plaintiffs, "which said promise and agreement all the parties to said transaction understood to be embraced in the sale of the good-will as embodied and set out in the said bill of sale." By plaintiffs' pleadings and the proofs adduced to support them, it is shown that the judgment

rests on the breach of an oral promise by defendants not to re-engage in the mercantile business, and on a parol understanding that such a promise was embraced in or implied from the following language of the bill of sale: "This to include also the good-will of the parties of the first part to go with the business." The evidence shows, without contradiction, that the sentence quoted was inserted by an attorney mutually selected by the parties after the discussion of a proposed stipulation binding defendants not to re-enter business as a competitor of plaintiffs, and after the sellers had refused to make such an agreement a part of the written instrument. The care and detail with which the contracts are drawn and the importance of a transaction requiring the payment of \$29,000 and the transfer of a stock of goods valued at that sum evince an intention of the parties to leave no material matter to oral controversy. Plaintiffs themselves asserted no right resting in parol until after they had conducted the store a year and a half and had sold all the property purchased.

On a record presenting the situation outlined, two well-established rules of law defeat plaintiffs' case: (1) In a duly-executed, formal, written contract containing the terms under which a stock of general merchandise is sold, a provision that the good-will of the seller's mercantile business is included in the sale does not imply an agreement that the seller shall not re-engage in such business. (2) Where the good-will of a mercantile business is included in a duly-executed, formal, written contract of sale, without any restriction on the right of the seller to re-engage in the same business, oral evidence that he agreed not to do so is inadmissible as varying the terms of the written instrument. *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199; *Bassett v. Percival*, 5 Allen (Mass.) 345; *Costello v. Eddy*, 12 N. Y. Supp. 236; *Hoxie v. Chaney*, 143 Mass. 592; *Love v. Hamel*, 59 App. Div. (N. Y.) 360; *Cottrell v. Babcock Printing Press Mfg. Co.*, 54 Conn. 122. These principles apply to the present case, and they leave plaintiffs without any breach of con-

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tract and without any competent evidence to justify a recovery.

The judgment is therefore reversed and the cause remanded to the district court, with directions to dismiss the action.

REVERSED.

LEETON, J., not sitting.

REES, C. J., and HAMER, J., agree to the reversal, but not to the order requiring a dismissal of the case.

HENRY R. GERING, APPELLEE, v. JOHN M. LEYDA,
APPELLANT.

FILED MAY 13, 1912. No. 16,693.

Malicious Prosecution: EVIDENCE. Evidence examined, and held insufficient to connect defendant with the criminal prosecution of plaintiff, set out in the petition.

APPEAL from the district court for Cass county: BENJAMIN F. GOOD, JUDGE. *Reversed with directions.*

J. E. Leyda, Byron Clark and William A. Robertson,
for appellant.

Matthew Gering and John O. Cowen, contra.

FAWCETT, J.

Action in the district court for Cass county for malicious prosecution. Judgment for plaintiff for \$1. Defendant appeals.

The complaint upon which plaintiff was prosecuted was filed in the county court of Cass county by the county attorney, and charged that defendant, being a druggist with permit from the city council of the city of Plattsmouth to sell liquors for medicinal, mechanical and chemical purposes only, did on July 5, 1908, unlawfully sell intoxica-

ting liquor, to wit, whisky, to one Samuel Beggs, "without first having obtained a license and given bond to the state of Nebraska, as required by law authorizing him, the said Henry R. Gering, to make such sale of intoxicating liquor, such sale not having been made for medicinal, mechanical or chemical purposes." Upon the hearing of that complaint, the defendant there (plaintiff here) was discharged and this action followed. The allegation against the defendant Leyda is that he maliciously and without probable cause procured the arrest and prosecution of plaintiff upon the complaint above set out.

One of the errors assigned by defendant, and the only one we deem it necessary to consider, is that the trial court erred in overruling his request for a peremptory instruction, and in submitting the case to the jury. The evidence of plaintiff himself is that one Beggs came to his store on Sunday, July 5, 1908. "He said he wanted some whisky. I said, 'We don't sell it on Sunday.' He said, 'I want it for medicine. I have got to have it. I am going to go into the country.' I asked him what his name was and where he lived, and he told me and that he was working out in the country. I says, 'Do you want it for medicine?' and he said, 'Yes, sir; I do.' I asked him how much he wanted, and put it up for him; took his money and delivered the goods to him, making the entry of the sale in the poison register." The poison register shows that the sale was 12 ounces.

The controlling question is: Did defendant Leyda procure the prosecution of plaintiff maliciously and without probable cause? The fact that a man is prosecuted on a criminal charge through promptings of malice on the part of the one instituting the prosecution is not sufficient ground upon which to base a suit for malicious prosecution, if there is probable cause for such prosecution. There must be both malice and want of probable cause before such an action will lie. In this case there is an entire absence of evidence to show that defendant made any false representations whatever to the county attorney, or did

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anything improper in causing the filing of the complaint above set out. In fact, the county attorney himself testified that he never counseled with the defendant or asked his advice, nor did he know that he had with any one else. He says he met defendant on the street, and defendant said to him that he had heard that a man by the name of Beggs was getting liquor at plaintiff's store; that he told defendant that he knew about it and had the matter in hand. Without going into the evidence in detail, it is sufficient to say that it clearly establishes the fact that the complaint against plaintiff was filed by the county attorney entirely upon his own initiative and without procurement on the part of defendant. The petition of plaintiff and his testimony show that he sold a bottle of whisky to Beggs upon the mere statement of Beggs that he wanted it for medicine. The evidence also shows that Beggs did not purchase it for medicinal purposes. Admitting that he deceived plaintiff, that would not establish the fact that, upon receiving information of such sale, the county attorney acted without probable cause in filing the complaint and prosecuting plaintiff therefor. But, even so, viewed from any standpoint, the evidence in the record before us is entirely insufficient to connect defendant with the prosecution of plaintiff. We think the court erred in not directing the jury to find for defendant as requested. Plaintiff has evidently concluded that there is no substantial merit in his action, as his counsel have neither submitted a brief nor appeared to argue the case orally.

The judgment of the district court is therefore reversed and the cause remanded, with directions to dismiss the action at plaintiff's costs.

REVERSED.

JOHN TIGER, APPELLEE, v. BUTTON LAND COMPANY ET AL.,
APPELLANTS.

FILED MAY 13, 1912. No. 17,006.

1. **Deeds: EXECUTION BY ATTORNEY IN FACT.** As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact therein designated by name, it may be properly signed by such attorney by his subscribing and affixing thereto the name of his principal alone.
2. ———: **ACKNOWLEDGMENT BY ATTORNEY IN FACT.** But in such a case he cannot complete the execution of such deed by an acknowledgment which recites that the principal personally appeared before the notary and acknowledged the execution of the deed to be his voluntary act. Such acknowledgment must state the truth, and recite that it is made by the attorney in fact, in his representative capacity.

OPINION on motion for rehearing of case reported, *ante*, p. 63. *Rehearing denied. Former opinion modified.*

FAWCETT, J.

Defendants have filed a motion for rehearing, or rather for a modification of our opinion, *ante*, p. 63. We are asked to modify the following language in our opinion: "The evidence also shows that the deed from H. E. Gibson to plaintiff for the Colorado lands was never signed by Mrs. Gibson, but that the name, 'H. E. Gibson,' was signed by A. L. Button, who admitted upon cross-examination that he may have attempted to imitate the handwriting of H. E. Gibson in making the signature. The deed is acknowledged before one Nellie Sheehy, notary public, who certified that 'H. E. Gibson (single)' personally appeared before her and acknowledged the execution of the deed to be 'his' voluntary act and deed. Miss Sheehy was an

employee of the Buttons. Mr. Button attempts to justify his action in signing the deed as was done, by testifying that he had a power of attorney from his sister, H. E. Gibson, authorizing him to sign her name to deeds and other instruments, and that he supposed that it was all right to sign that way. It is incredible that, after transacting business as a real estate dealer for about 20 years, in seven states and territories, with offices in something like 15 cities in those states, he should be ignorant of the fact that his power of attorney did not give him authority to sign a deed in any such manner." Counsel state that, while the above is "probably dictum and entirely unnecessary to the decision of the case, yet it is now urged upon the attention of this court, as a rule of law, in the brief of counsel in another suit soon to be presented at this bar." This statement impels us to consider and definitely determine the question now.

Counsel argue that, as Mr. Button had a power of attorney from H. E. Gibson to sign her name to deeds, he had a perfect right to sign the deed in controversy, as was done, and cite *Devinney v. Reynolds*, 1 Watts & Serg. (Pa.) 328; *Forsyth v. Day*, 41 Me. 382; *Berkey v. Judd*, 22 Minn. 287, 302, in support of their contention. In the last sentence of the quotation from our opinion above given the word "execute" should have been used instead of of the word "sign," so as to include the acknowledgment as well as the signing, which the quotation from the opinion shows was what was under consideration. We concede that the weight of authority is to the effect that where A. B. has a written power of attorney from C. D. to sign deeds for the latter, he may sign the deeds "C. D.," without adding "by A. B., his attorney in fact," but he cannot complete the execution of that deed by an acknowledgment which recites that "C. D." personally appeared before the notary and acknowledged the execution of the deed to be his voluntary act. Such a recitation would be false, and a deed so executed would not be good even under the authorities cited by defendants.

In *Deviney v. Reynolds, supra*, the deed recited: "Know ye that Michael Hollman, by William M'Allister, his lawful and regularly deputed attorney in fact, for and in consideration of," etc., and concludes: "In witness whereof, the said Michael Hollman, by his attorney aforesaid, hath hereunto set his hand and seal." The deed was simply signed "Michael Hollman. (Seal.)" The certificate of acknowledgment recited: "Personally came William M'Allister, attorney as aforesaid, and acknowledged the foregoing deed poll as the act and deed of the said Michael Hollman," etc. It was in reference to that kind of an instrument that the court in the syllabus held: "It is not necessary to the proper execution of a deed by an attorney in fact that he should sign his name to it; the name of the principal alone is sufficient."

In *Berkey v. Judd, supra*, the opinion states: "It is recited in the body of the deed (exhibit C) that it is an 'indenture between Albert H. Judd' and others therein named as principals, 'by their attorney in fact, Orange Walker, and Orange Walker, parties of the first part,' and the said Greeley & Ludden of the second part. The deed purports to be signed and sealed by said first parties as follows: 'In testimony whereof the said parties to these presents have hereunto * * * set their hands and seals,' etc. 'Albert H. Judd, Caroline Judd, Asa Parker, Geo. B. Judd, Mary Ann M. Judd, Hiram Berkey, Georgiana E. Walker, Orange Walker.'" To the right of the first seven names there was drawn a single bracket, and written opposite the bracket are the words "By their attorney in fact." The opinion, after setting out the signatures as above, states: "As appears from the certificate of acknowledgment, Walker personally acknowledged the execution of said deed by himself as 'his individual act and deed,' and also as 'his act and deed as attorney in fact as aforesaid,' and 'for and on behalf of the said Albert H. Judd,' etc., 'as their true and lawful attorney in fact.' The name of Orange Walker subscribed to the deed is clearly indicated by its position and seal as his individual

signature as one of the grantors, and not as an agent. So far as he is concerned as one of the parties of the first part to the indenture, it was properly and legally executed and acknowledged. As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone. *Devinney v. Reynolds*, 1 Watts & Serg. (Pa.) 328; *Forsyth v. Day*, 41 Me. 382. In this case the deed purports on its face to be the indenture of the principals, and not that of the agent. It fully discloses that it was made for them and in their name by their attorney in fact, Orange Walker, who had full authority so to do. Its execution was properly acknowledged by him as such attorney in fact, and for and on behalf of his said principals. The neglect to sign his own name to the words 'by their attorney in fact' was a purely technical omission, devoid of any legal effect whatever." This leaves only *Forsyth v. Day*, *supra*, as apparently supporting the contention of defendants. In that case *Wood v. Goodridge*, 6 Cush. (Mass.) 117, is quoted from as follows: "It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for that purpose. It is not enough that the attorney in fact has authority, but it must appear by the instruments themselves, which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves." The writer of the opinion then states: "No case, I apprehend, can be found in the books which will sustain the rule so broadly

laid down by the learned judge in the case of *Wood v. Goodridge*." In the case under consideration by the Maine court, the instrument in controversy was a promissory note. In the latter part of the opinion, it is said: "From these considerations it results that all the notes introduced in this case, dated subsequent to the note in suit, and all other notes introduced, the existence of which was not proved to have been known to Daniel at or before the inception of the note in suit, were not competent evidence from which a jury would be authorized to infer original authority from Daniel to Adoniram to place his name on the note in suit, and for that specific purpose should have been excluded. Were these same notes competent evidence from which the jury could legitimately infer the adoption or ratification of the one in suit? The ratification of an act is equivalent to the original grant of authority." The court then proceeds to consider the case upon the theory of ratification, and finds that the notes were not competent evidence even for that purpose, and a judgment for plaintiff upon the note was reversed. An examination of this case shows that its criticism of *Wood v. Goodridge, supra*, was not only mere dictum, but that it has no application to an instrument which requires a formal acknowledgment as a part of its execution. It is no answer to this proposition that a deed as between grantor and grantee is good without any acknowledgment. Such is not the usual course of business, and it will not be contended that plaintiff in this case could have been required to accept from the defendants an unacknowledged deed. It is suggested in brief of counsel that *Wood v. Goodridge, supra*, has been practically overruled in Massachusetts. They do not cite any cases to that effect, nor has the writer been able, after diligent search, with the aid of Shepard's Notes, to find a later case in Massachusetts in any manner overruling *Wood v. Goodridge*. It has been cited and followed in a number of cases upon other points. The only case which we have been able to find, which would seem to even criticize it, is *Hunter v. Giddings*, 97 Mass.

41. That suit was based upon an instrument in writing, by which defendant agreed to cut and haul to plaintiff's paper mill 600 cords of wood. In the opinion it is said: "The ruling of the learned judge at the trial was probably made upon the authority of some of the expressions used in the case of *Wood v. Goodridge*, 6 Cush. (Mass.) 117. But, without considering the precise accuracy of all the observations found in the opinion in that case, upon a point which was not necessary to its decision, we do not think it applicable to the case at bar. The contract upon which this suit is brought was a contract, not under seal, for the sale of personal property. It was not essential to its validity that it should be in writing. Some memorandum in writing, signed by the defendant, was originally requisite to enable the plaintiff to enforce it, under the statute of frauds; but the contract itself might have been oral. Upon such a contract, if made by the agent in the name of the principal, without indicating the agency, the principal might be held, if he had afterward recognized and acted upon it. *Merrifield v. Parritt*, 11 Cush. (Mass.) 590. The oral contract between the parties, if the plaintiff's signature was treated as a nullity, would support his action."

The authorities cited upon the question of ratification or subsequent adoption of an unauthorized execution of a deed, and as to the proof required to establish a lost deed, are not in point.

We think further discussion is unnecessary. To the extent of substituting the word "execute" for the word "sign," as above indicated, our former opinion is modified, but in all other respects it is adhered to, and the motion

OVERRULED.

Murten v. Garbe.

MURTEN, APPELLEE, V. ALBERT F. GARBE,
APPELLANT.

FILED MAY 13, 1912. No. 18,676.

SCUTION: PETITION: SUFFICIENCY ON APPEAL. If the a petition charge both a malicious prosecution and sonment in one count or cause of action, and there on on that ground until after trial and judgment, a will not be considered upon appeal.

CATION. If one makes use of a criminal statute to the unlawful arrest and imprisonment of another, ible cause for so doing, he cannot justify such arrest ment on the ground that the statute is unconstitu- defective that there could be no conviction under it.

SUFFICIENCY OF COMPLAINT. In a prosecution under laws 1907, it is not material when the relation of tenant began, or will terminate. It is sufficient in f the defendant was the tenant, and as such tenant sion of the property when embezzled by him.

IMENT OF ERRORS: REVIEW. Alleged errors not spe- ned in the motion for new trial will not ordinarily in this court, especially in civil cases.

ENCY OF EVIDENCE: BRIEFS. When it is contended no evidence upon some particular issue, and the iminous, the brief should refer to all evidence in the g upon the point in question. Unless it is clear that f fact essential to the finding and judgment is sub- supported, the judgment will not be reversed for a dence.

i the district court for Fillmore county:
D, JUDGE. *Affirmed.*

Vhedon and H. P. Wilson, for appellant.

Ioan, F. W. Sloan and J. J. Burke, contra.

peal by defendant from a judgment of the
or Fillmore county.

The petition alleges that the sonable or probable cause there before the Honorable W. R. Fult more county, Nebraska, with the zlement." The petition then al "falsely and maliciously and therefor," caused the county judg this plaintiff to be arrested on forcibly brought before" the coun obliged to give bond for his ap that the case was then heard and and the prosecution ended, with general and special. The defens ered hereafter so far as is necess of the questions presented.

1. The first objection is that t a cause of action. The principal this objection is that the statute tion against this plaintiff was bro and is otherwise so defective as and that therefore the compla offense. The statute in question i which is as follows: "If any ter out the consent of his landlord to or convert to his own use the sha thereof of the crop or products l with intent to defraud the land or persons shall be punished in t law for feloniously stealing prop article or articles so embezzled, converted." And the criminal facts necessary to constitute an valid. We do not consider it ne critical discussion as to the val effect of this statute. The petition out in general what are alleged to the transaction. It does not de malicious prosecution or false i

was no motion or attempt in any way to require him to do so. If the defendant made use of the provisions of this statute to bring about an unlawful arrest and imprisonment of the plaintiff, and without any probable cause for so doing, he is not now in position to rely upon the alleged unconstitutionality of, or defects in, the statute which he so used. "The defendant in an action for malicious prosecution will not be permitted to urge the insufficiency of the complaint on which he caused the plaintiff's arrest as a defense to the action." *Minnesota Threshing Machine Co. v. Regier*, 51 Neb. 402. *Hackler v. Miller*, 79 Neb. 209.

2. There is no merit in the objection that the statute is *ex post facto* as relates to the transactions involved herein. It is immaterial that the lease under which this plaintiff held the premises was executed before the statute in question took effect. The criminal complaint alleged that at the time of the alleged conversion of the property the relation of landlord and tenant existed, and, that being true, it is immaterial when that relation originated or how long it was to continue.

3. The third and fourth assignments of error relate to the giving of two several instructions. These supposed errors were not so assigned in the motion for new trial as to entitle them to consideration, nor do they seem to possess much merit.

4. The remaining objections relate to the sufficiency of the evidence to support the verdict. The defendant says in the brief that "there is not a syllable of testimony that Garbe did not tell all of the facts" to the attorney whom he consulted and upon whose advice he relied in bringing the prosecution. "In the absence of any conflict in the evidence, therefore, on this point, Garbe had probable cause to file the complaint. The question as to probable cause was one of law, and the court should have instructed the jury to find for the defendant." The plaintiff says: "The question of probable cause and the matter of full disclosure was fairly submitted to the jury in the charge of the court, and the instructions presented by appellant

Albrecht v. Morris.

on this subject are substantially incorporated in said charge. The evidence of the appellant was conflicting and unsupported either by the county attorney or by his private counsel, H. P. Wilson, who assisted in the trial, and, as the same was flatly denied, the jury were entitled to discredit his testimony, if they found the same not to be credible." There is no abstract of the record, and there is no reference to the record in either brief in support of the respective assertions of the attorneys. From our investigation of the record upon this point, it seems that it is not so clear that the defendant in good faith made a full and correct statement of the facts to his attorneys and relied upon the advice of counsel in commencing the prosecution as to require the court to determine that matter as a question of law.

We do not find any error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

ALMA ALBRECHT, ADMINISTRATRIX, APPELLEE, V. GEORGE MORRIS ET AL., APPELLANTS.

FILED MAY 13, 1912. No. 16,677.

1. **Negligence: SUFFICIENCY OF EVIDENCE.** Evidence examined, as indicated in the opinion, and found sufficient to support the finding that the injuries of the deceased were caused in the manner alleged in the petition.
2. ———: ———: **CUSTOM.** A custom of leaving trenches uncovered when located in inclosed premises would not constitute a complete defense against an allegation of negligence in so doing, if the conditions and circumstances were such as to cause a reasonably prudent and cautious man to believe that human life or safety were endangered thereby.
3. **Appeal: SUFFICIENCY OF EVIDENCE.** When the evidence is substantially conflicting, this court cannot set aside the finding of the jury. Evidence examined and found sufficient to support the

Albrecht v. Morris.

injuries complained of were the proximate cause

ON FOR DEATH: INSTRUCTIONS: HARMLESS ERROR. To recover damages for negligence causing the death of a person, it is erroneous to instruct the jury that the negligence is meant negligence on the part of the defendant. If the jury is also told that contributory negligence of the deceased would prevent a recovery, and the whole charge that the word "plaintiff" was used, and that the jury must so have considered it, is regarded as without prejudice to the defendant.

—: —. In such action it is erroneous to instruct that if "the injury to the deceased was caused by the negligence of the defendants, and that such injury caused the death of the deceased, then you should find for the plaintiff." But if the jury are told that plaintiff cannot recover unless such injuries were the proximate cause of the death, it appears from the instructions that the jury must find that plaintiff could not recover unless the injury was in such a degree as to be in fact the proximate cause of the death of the deceased, the error will be dis-

PRESUMPTIONS. If a person is killed through the negligence of another, and there is no evidence as to negligence on the part of the deceased, the law presumes that he was exercising reasonable and ordinary care at the time with a view to his safety.

FACTS. A physician and surgeon, who attended an injured person who afterwards died of his injuries, testified to the condition of the deceased as disclosed by a medical examination immediately after the injury, and that the deceased as to pain suffered by him and necessitated the removal of the location and extent of his in-

The district court for Douglas county:

JUDGE. *Affirmed.*

Hall, for appellants.

He and J. W. Battin, contra.

as administratrix of the estate of her de-

ceased husband, Adolph Albr in the district court for Douglas for the death of the deceased by the negligence of these defendants. They have appealed from the judgment.

1. In May, 1908, the plaintiff was living in a rented house on 1st street of Omaha. The defendant, Cardell, and under the direction of his foreman, dug trenches for water pipes upon the sidewalk, allegedly, carelessly uncovered which the deceased fell and was disabled him for several months, and caused his death. It is contended that they were under no obligation to cover the trenches, as it is not customary to cover such trenches in such circumstances; and, further, that the deceased received his injuries while passing the trench, or that the injuries occurred as a result of his death. There was another trench distant from that of the deceased, on the side of the deceased's residence. On the walk the trench was dug in the sidewalk, 8 feet in length, about 5 or 6 feet apart, the intention being to lay water pipes. On the day's work Mr. Cardell left the trenches open, and the plaintiff was not covered; that on account of the fact there would be danger of people falling thereupon covered the trenches, one of them being covered with a board 16 to 24 inches in width. On the next evening, the plaintiff and his wife were away from home, and the other part of the trench in the sidewalk that it should be guarded, he

use, leaving a part of the trench in the yard one plank only, which he says he placed in the trench, leaving a small opening on each plank. The deceased, who was a man about 78 years accustomed to return home at about 5 or 6 in the evening, and on that evening the plaintiff arrived at about 10 o'clock. She testifies that there was a strong wind and rain during the evening, which was the time she arrived at home, and that she found the deceased in the house lying upon a couch in his nightgown and slippers, and suffering extreme pain from his injuries. She was not allowed to testify to the cause of his injuries, but that his leg was bruised from his foot to his knee was badly bruised and painful, and his shoulders were injured and that he was in great pain in other parts of his body; that there was a hole in the side of the trench that had been left one plank only, indicating that some one had been in the trench and that deceased's foot and clothing were in the trench, and that the clay was of the same color as the clay similar to that composing the side of the trench, and that his coat and umbrella were dry, indicating that he had not been in the rain. She also testified that there was a window in their house just opposite this side of the trench at which she went away from home early in the evening and that when she returned that night she found the window closed; the theory of the plaintiff being that the deceased, on the approach of the storm, attempted to close the outside blinds, and in doing so fell into the trench. The defendants say that this testimony is not sufficient to justify the jury in finding that the deceased fell into the trench. Some of this testimony was contradicted by other witnesses. She was examined and cross-examined at great length and appears to be a candid and reliable witness. It is the duty of the jury to determine as to the truth of her statement, and the court must therefore, for the purpose of this

objection, consider the circumstances as testified to by her. If, therefore, we consider these circumstances as fully established by her testimony, we think they are sufficient to justify the jury in finding that the injuries of the deceased were caused by falling into this trench, as alleged.

2. The contention that the defendants were not negligent in partly uncovering this trench cannot be sustained. If they had established a custom of leaving such trenches open in inclosed premises, still, considering the surroundings and the possible danger of accidents, it would be for the jury to determine whether such a custom was reasonable under all the circumstances; and, if the defendants had been warned that there would be danger in leaving the trench uncovered, it would be for the jury to determine whether it was reasonable and the exercise of due care to remove this covering in the evening and without any warning to the occupants of the premises.

3. The contention that these injuries were not the cause of the death of the deceased is likewise untenable. Dr. Walker was called very soon after the injuries, and testified fully to the condition of the deceased and to the extent of his injuries; that the deceased was confined to his room for some time, and afterwards for a short time walked with much difficulty, and that his condition continually grew more serious until the time of his death, which the doctor testified was due primarily to the injuries complained of. When the evidence upon the material issues of the case is substantially conflicting, we cannot disturb the verdict of the jury.

4. The court instructed the jury: "By contributory negligence is meant negligence on the part of plaintiff directly contributing to the cause of his injury." The objection to this instruction is that it excludes the idea of contributory negligence on the part of the deceased. If this were the only instruction given on the subject of his contributory negligence, the objection would be serious. However, the court, in at least three other instructions, plainly instructed the jury that contributory negligence

the deceased would prevent recovery, and he complained of the use of the masculine pronoun that the word "plaintiff" was inadvertent in the instruction. Considering all of the circumstances, it does not appear that the jury was misled in this respect.

The court so instructed the jury as follows: "The court holds that if you find from the evidence that the death of the deceased was caused by the negligence of the defendant, and that such injury caused or contributed to the death of the deceased, then you should find for the plaintiff provided you find from the evidence that the defendant was not guilty of negligence which contributed to the death of the deceased." Again, it may be said that, if this was the only one upon this point, the jury was misled. It is not sufficient that the negligence of the defendant "contributed to the death of the deceased." The negligence must be the proximate cause of the death which caused the death. It is an imperative duty to correct an erroneous instruction upon a material point by a contrary instruction in the first instance. The instruction complained of was not the only one given to the jury. The instruction complained of was to the effect that the jury to what extent the negligence of the defendant must contribute to the death of the deceased. This instruction is not necessarily inconsistent with the instructions given by the court in which the court plainly told that the negligence of the defendant must be the proximate cause of the injuries which caused the death of the deceased. The instructions given to the jury were full and comprehensive upon this point and upon the other issues involved, and we do not think that the jury were misled by the language of the instruction complained of.

The court so instructed the jury: "You are instructed that if you find from the evidence that the plaintiff's son is injured through the negligence of the defendant, and that the injured person thereafter dies, and there is no intervening cause between the happening of the injury, the law presumes that the injured person was exercising reasonable

and ordinary care at the time of his injury with a view to his safety." The objection to this instruction is that it left the jury in doubt whether "the presumption of due care was conclusive or merely evidentiary." It would have been quite proper to inform the jury that this presumption was not conclusive if there was other evidence bearing upon that question. The jury must determine whether the circumstances and evidence tend to show contributory negligence on the part of the deceased, and only indulge in the presumption which the law raises in the absence of other evidence. The record does not show that the court was requested to so modify or explain the instruction, and the instruction as given is technically correct.

7. The court gave the jury the following instruction: "You are instructed that certain evidence was introduced by certain witnesses as to exclamations and statements of the deceased as to his physical condition. Such elements were introduced and received for the purpose only of showing his physical condition and pain and suffering at the time of such exclamations and statements, and as pertaining to the question whether or not the injuries complained of caused or were proximate to the death of the deceased." The objection urged is that this instruction allows the jury to consider the "exclamations and statements" of the deceased "as pertaining to the vital question in the case, to wit, the proximate cause of his death." There seems to be no ground for this objection. All statements of the deceased in regard to the cause of the accident were rigidly excluded by the court. In his examination by the physician the deceased made statements as to the location of the pain which he suffered, and similar statements which were admitted as a part of the physical examination made by the physician. If these tended to show the extent of his injuries, they would pertain to the question whether such injuries were of such a nature and degree as to be regarded as the proximate cause of his

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plaintiff replied that the paper was procured by fraud and misrepresentation, setting out fully the transaction, and also alleged that defendant's agent "misread said receipt and paper to plaintiff and fraudulently misstated the contents thereof to plaintiff while pretending to read said receipt and paper, and, in misreading said receipt and paper, represented to plaintiff, and plaintiff understood, that it was simply a receipt for his medical and surgical attention, and had nothing to do with any claim for damages, and in reliance upon such understanding and representation he signed the receipt and paper." The evidence was that the agent did not read the paper at all, but, holding the paper in his hands, stated to plaintiff the contents and nature of the same. *Held*, That such variance between the allegation and the proof was immaterial.

5. ———: ———: **LIABILITY OF MASTER.** An employer is liable for damages caused by the negligence of his employees while engaged in the ordinary work of their employment. The fact that one employee, sued jointly with the employer, was found not to be liable will not prevent a recovery against the employer, if the negligence of other employees was the proximate cause of the injury complained of.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

Wilmer B. Comstock, contra.

SEDGWICK, J.

This plaintiff alleges that while he was in the employ of the defendant he suffered a personal injury and serious damages caused by the negligence of the defendant. He recovered a judgment in the district court for Lancaster county, and the defendant has appealed.

1. The first contention is that the evidence does not support the allegations of the petition; that is, that there is such a variance between the allegations and the proofs that the judgment cannot be allowed to stand. The petition alleges that the defendant was "engaged in the business of manufacturing, storing, selling and shipping threshing machines. * * * On the sixth day of June,

Machine Co.

tly and carelessly stored separator, the king-bolt, is broken, defective and all known to defendants, knowledge. On the date Randall negligently and told the plaintiff to remove same. The defendants neglected to provide any tongue or lever or push said separator, or pull thereof for the plaintiff's hands upon the front and move the same. Said dangerous piece of machinery, as aforesaid, the plaintiff, as aforesaid, undertook to move in warehouse, and to guide one of the front wheels while in the exercise of the reason of the joint and defendants, as aforesaid, in putting said separator to use with said broken king-bolt, ball, and carelessly failing to provide any appliance to guide said separator, carelessly ordering plaintiff to move broken and defective dangerous portion of said separator and wheels thereof fell upon and pinioned and held said plaintiff's heavy portion of said separator for several minutes, and refused to raise it up and move it, and his hand and wrist were crushed, muscles, tendons, ligaments, and wrist so crushed, and destroyed all use of said

The allegation that "defendants negligently and carelessly failed to provide any tongue or other appliance by which to draw or push said separator" was entirely unsupported by evidence. The plaintiff testified that there was not room in the store-room to "put a tongue in and operate it in the house," and it appears that the separators were for that reason necessarily kept in that respect as this one was. This condition was well known to the plaintiff, and he must be held to have assumed the risk, if indeed there was any risk, caused solely by the absence of "any tongue or other appliance to guide" the separators in the store-room.

It is contended that the gist of the allegation of negligence upon which the plaintiff's recovery, if any, must depend was in permitting the separator to remain in the warehouse with the broken "king-bolt, ball, or third wheel," and that the evidence "shows that the break in the king-bolt had nothing whatever to do with his injury." The testimony of the plaintiff himself, as well as all other testimony in the case, was that the "bolt or ball" was not securely fastened in its place, "and this machine, the socket not being tightened up, there was nothing to hold the ball in there, and it just slipped out and let the machine down on my hand." Without stating in detail the conditions that caused the accident, it is sufficient for an understanding of the question thus presented to say that the record shows that the coupling between the front axle and the framework of the separator became separated at the forward axle; this allowed the axle to revolve forward, which suddenly lowered the body of the separator upon plaintiff's hand as it rested on the wheel. The coupling was formed by the ball and socket spoken of in the evidence. If the socket had been properly bolted, it would have held the ball securely, and the coupling could not have separated. The allegation was that "the king-bolt, ball, or third wheel" was broken, defective and out of repair. The proof was that the ball slipped from the socket because the socket was not properly bolted.

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institute such a variance between the allegations as to defeat a recovery? The defendant knew what issue he will be called upon to answer and brings into court the evidence to answer the alleged against him, and not some other issue. It may be within the knowledge of the parties, but the plaintiff has not called upon him to answer. This is the scope and purpose of the rule that the allegations and proof must agree. The rule is a necessary part of the administration of justice must always be applied in its true spirit and meaning. It has been consistently applied in different jurisdictions. The parties have gone to the extreme of literal application of the rule, regard to the purpose of the rule, and apart from considering whether the defendant could have been misled by the variance. See *Wabash v. Friedman*, 146 Ill. 583. A technical violation of the law ought not to work a reversal of a verdict otherwise free from error, if it appears from the evidence that the defendant was not prejudiced thereby. The complaint was that, through the negligence of the defendant, the coupling became separated and caused the forward part of the separator to strike the ball, the ball escaped from the socket because the coupling was defective or out of repair, or because the separator was defective or out of repair, not being so, is not so material as to have seriously prejudiced the defendant in the light of the evidence in this case.

The only objection is that incompetent evidence was introduced bearing upon the measure of damages. The defendant testified that his regular trade for a number of years was that of a boilermaker, and when on the stand he was questioned and answered as follows: Q. What is the result of the business and occupation of a boilermaker? A. What extent did you use your left hand? A. I can't use it to do any good. * * * Q. What was the effect of the injury upon the functions of the left hand? A. It prevented me from using it.

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of your left hand in the pursuit of boilermaking? * * *
A. I couldn't use it at all. * * * Q. Just explain to the jury in what way it has been impaired for use in boilermaking. * * * A. I don't just understand that. Q. Well, in what way has its use been affected for boilermaking? * * * A. Well, it is all shriveled up, and there is no strength in it, not enough to hold a tool, and I haven't fingers enough to hold a tool." These questions and answers were objected to as incompetent, irrelevant and immaterial, and exceptions taken to the ruling of the court. The plaintiff had for some time been in the employ of the defendant, and there was no allegation in the petition that he was ever engaged in the occupation of a boilermaker or that he suffered any damages in that occupation on account of his injuries. It must be conceded that the questions were incompetent, but the question is whether the evidence was of such a nature as to be prejudicial to the defendant, requiring a reversal. There is very little evidence as to the nature of the occupation of a boilermaker, and no evidence of the possible earnings of the plaintiff in that capacity. The answers complained of related solely to the condition of the hand, which of course was competent evidence. The evidence itself being competent, we cannot reverse the judgment because of the form of the questions, unless we can see from the record that the defendant might probably have been prejudiced thereby. We think that the error was without substantial prejudice to the defendant, requiring a reversal of the judgment.

3. The defendant offered in evidence a written instrument signed by the plaintiff, which purported, in consideration of the payment of \$62 "doctor's bill and other good and valuable consideration," to release the plaintiff from all claims for damages on account of the accident complained of. This writing was pleaded in the answer as a defense, and the plaintiff in reply alleged, among other things, that the defendant's agent who procured the defendant to sign the writing "pretended to read said

receipt." It is contended that this allegation is not supported by the evidence. The plaintiff testified that the defendant's agent neither read nor pretended to read this document to him. Upon this point the court instructed the jury: "In reference to this purported release, you are instructed that if the defendant, its agent, or representative pretended to read to the plaintiff the said purported release, and, in doing so, purposely misread the same, and thereby misled the plaintiff concerning the contents thereof and caused plaintiff to believe and understand that said release only discharged and was only in settlement of expenses incurred for surgical and medical attention to his injury, and that the plaintiff relied upon the statements and representations made by the defendant company, by and through its authorized agents and employees, and signed said settlement because thereof, and without negligence on his part, said release or written instrument would not under such circumstances bar the plaintiff's right to recover, but he would be entitled to maintain his action notwithstanding the signing of said release." It is insisted that this instruction was erroneous because of the variance above indicated. The plaintiff testified that the company's manager "sent me up to the doctor's to get the bill, and the doctor didn't have the bill ready, and he said, 'Anyway Mr. Randall (the manager) told me he would pay that bill, what do you want with it?'" That he went several times after the bill, and finally brought it down to the manager, who handed him \$62, which was the amount of the bill, and told him to go back and pay the bill, and the witness continued: "That was when I signed this to show that I had accepted this \$62 to pay the doctor bill with, whatever it is, exhibit 'C,' that is when I signed that one. And then after I paid the bill I brought back a receipt from the doctor to Mr. Randall that the bill was paid, but that didn't seem to be satisfactory to him, and then he called me in and asked me to sign this (referring to the release). He said, 'This is just a receipt to show that we paid the doctor bill, to

show to the company that we paid the doctor bill, and I want you to sign it.' I took it and started to undertake to read it, which would take me a long while to figure it out and fool with it, because I couldn't read good, and am a very poor hand at reading anyway, and undertook to take time to read it, and he said hurry up and sign that, that is very important business, and it has got to go off on this afternoon mail. So I signed it on what he said and let it go at that. I supposed that was all there was to it. Q. Now, what, if anything, did he do in reference to reading it? A. He didn't do anything any more than just hold it up and said, 'This is to show we paid the doctor bill. We want to show to the company that we paid the doctor bill.' He didn't pretend to read it whatever. Q. He pretended to state what it contained? A. Just pretended to state what it contained; yes, sir. Q. Now, did you rely upon his statement as to what it contained? A. Yes, sir; I had nothing else to rely on. He wouldn't give me time to try and figure it out. Q. Did you know at that time that it contained any matter excepting a receipt that the doctor bill had been paid? A. No, sir; or I would never have signed it, because I had made up my mind right on the start I would not sign any such a thing, and told him so." He further testified that he could not read the paper and that the manager knew of his inability to read. He testified to other circumstances which tended to support his contention that the manager, while holding this release in his hands, stated to the plaintiff what he represented was the contents of the paper. This evidence was sufficient to require the jury to determine the facts in regard to the matter, and there is no such variance from the allegations of the petition as to require a reversal under the law as already stated.

4. The defendant's final contention is that the defendant and its manager were sued jointly, and there was an allegation in the petition that "the said injuries and damage aforesaid resulted wholly and entirely from the joint and concurrent negligence of the defendants in the man-

Merwine v. Central Irrigation District.

reinbefore alleged;" that, therefore, the instructed that there was no evidence ager, the verdict against the defendant ned. The petition seems to have been theory that the manager had personally ling and negligently failed to properly the bolts that held the socket, but the at other employees had been sent by the his work and it was their negligence in caused the trouble. Under this condi- ice the manager could not be held per- it the defendant is responsible for the employees. This objection therefore is

or in the record requiring a reversal, and he district court is

AFFIRMED.

**WINE ET AL., APPELLANTS, V. CENTRAL
ATION DISTRICT, APPELLEE.**

LED MAY 13, 1912. No. 17,063.

REMAND: PROCEDURE. When the judgment of the
ersed by this court upon appeal, and the reversal
out specific instructions, the trial court has dis-
amendments upon terms, and in the further dis-
case. It has no discretion to dismiss the action
her proceedings.

e district court for Scott's Bluff county:
ES, JUDGE. *Reversed with directions.*

: and *L. A. Berry*, for appellants.

and *James E. Philpott*, contra.

appeal in this case the judgment of the

district court was reversed and the action dismissed. 85 Neb. 687. Afterwards upon a motion to modify the judgment this court made and entered the following order: "Upon a consideration of the motion for a rehearing and to modify our judgment, for reasons unnecessary to state, the motion for a rehearing is overruled, but our opinion and judgment are so modified that the judgment is reversed and the cause remanded for further proceedings." After the mandate of this court was returned and filed in the district court, that court entered the following order: "Now on this August 29, 1910, same being one of the regular days of the special August 1910 term of said court, this cause came on for hearing by the court, having been remanded to this court by the supreme court, for further proceedings. After having fully and carefully considered the opinion of the supreme court rendered in the above entitled cause, this cause is hereby dismissed for want of jurisdiction in this court to hear and determine the issues raised herein." From this order dismissing the case the plaintiffs have appealed.

As shown in the former opinion, this is an action in equity, for the purpose of having certain lands of the plaintiffs detached from the irrigation district, defendant, under the provisions of section 49, art. III, ch. 93a, Comp. St. 1911, which provides: "That in no case shall any land be held by any district or taxed for irrigation purposes which cannot from any natural cause be irrigated thereby." The question presented upon the former appeal was whether the special findings of the trial court supported the judgment, and it was held that they did not. Those special findings were: "(1) That the plaintiff, George Sowerwine, is the owner in fee of the lands claimed by him; (2) that plaintiff Elizabeth Sowerwine is the owner in fee of the lands claimed by her; (3) that all of said lands are included in and are part of the defendant irrigation district; (4) as to lot 3 in section 31, lots 5 and 6 in section 32, lot 2 in section 5, and all that part of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 31, and lot 1 in section 6,

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d 4 in section 5, lying and situated north of r line above referred to, * * * 'that down entral part of the same, from the west to the igh which holds more or less water during r; that the North Platte river maintains its from about the 1st day in May until from July to the 1st of August; that during high river said slough becomes practically full of ie part of the said land involved herein is wet and spongy, and at different places has er-holes of greater or less dimensions; that w-water period of the year in the river, from to May, said slough becomes practically dry, nvolved is dry; that the balance of said land all dry and fit to be mowed, and the same ed for hay for a number of years; that dur- tion season said land is rendered more or eason of seepage from the central ditch and erefrom being thrown on the land herein.' " ndings it appeared that the lands consisted ifferent tracts, located in different sections, different parties. The finding that some of es overflowed with water, and that other practically all dry and fit to be mowed, and been mowed for hay for a number of years,"

not justify a decree detaching all of the e irrigation district. The decree was there- . Under these circumstances, however, it or to dismiss the case without a trial upon t might appear upon the trial that all of the d should be detached from the irrigation at some of the tracts should be detached and that none of the tracts should be detached. iscovering its error, modified the judgment nd the cause for further proceedings in the noted.

d that when a cause is reversed by this court . generally, as this was, the trial court is to

exercise its discretion in the further consideration of the case, and that, the court having exercised its discretion, no error can be predicated thereon. The duty of the trial court is expected to exercise its discretion in the further disposition of the case. It appears from the order of the trial court that the dismissal was based solely upon the opinion of the trial court not exercising any discretion in the further disposition of the case and the further disposition thereof. The opinion of this court and the order modifying it indicate a further trial of the case. The trial court was in error in construing its order of dismissal thereof. "If the reversal is granted and the cause remanded for further proceedings, with instructions, it is the duty of the lower court to exercise its discretion in the matter of allowing amendments as well as other matters in the further disposition of the case." *Gadsden v. Thrush*, 72 Neb. 1. In the trial court is to exercise its discretion in "allowing amendments" and in the further disposition of the case, and no discretion to dismiss the action without further proceedings.

The judgment of the district court dismissing the action is reversed and the cause is remanded, with instructions to allow amendments to the pleadings, if the court so to do, upon suitable terms, and to hear and render such judgment as the law requires.

STATE OF NEBRASKA V. M. ELAM.

FILED MAY 13, 1912. No. 17,400.

Food: PURE FOOD ACT: VIOLATION OF REGULATIONS.

Provides that testing of cream for commercial purposes shall be done in accordance with the rules and regulations prescribed by said commission." Ann. St. 1911, sec. 100. The commissioner made a rule that payment for cream

to v. Elam.

d not be made on the same day of the defendant could not be punished criminals rule.

court for Richardson county:
Exceptions overruled.

ney General, Frank E. Edger-
or plaintiff in error.

formed against in the district
nty for an alleged violation of
eral demurrer was filed to the
ustained by the court, and the
mitted to file his exceptions in
nstruction of the statute under
; brought.

that the defendant held a per-
ommissioner to test cream, and
purchased cream for commercial
cream on the same day that he
the provisions of regulation 59
ons of the food, drug and dairy
form of the statute," etc. The
has adopted regulations, among
9, which recites that the test of
and exactness, and that to make
30 minutes, and agents cannot
as they are received and give a
and attention, and continues:
cts it is hereby ruled by the food,
mer that samples of cream shall
the close of each day's receipts
ig; the samples to be kept in
held. In order to prevent any
ing it is further ruled that the

payment in whole or in part for cream shall be suspended until the following day, or the time of the next delivery. Payment for cream prior to the day following delivery, as a means of securing business or of taking advantage of another operator, is a violation of the rule and punishable under the law."

The gist of the offense which it was attempted to charge against the defendant is that he paid for the cream on the same day that he purchased it. The statute provides: "In testing milk or cream for commercial purposes under the provisions of this act the same shall be done in accordance with the rules and regulations therefor prescribed by said commission." Ann. St. 1911, sec. 9838. "The term 'to test milk or cream' as used in this act is hereby defined as the process or method by which the percentage of butter fat in said milk or cream is determined." Section 9832. The contention of the state appears to be that, since it requires 30 minutes or more to test cream properly, and it is not convenient for the party testing it to collect his samples and make his tests until "at the close of each day's receipts or the following morning," paying for the cream purchased is so far a part of the testing, or so necessarily connected with the testing, as to justify the regulation thereof by the food commissioner, and, since this regulation is therefore within the jurisdiction of the food commissioner, to make payments for the cream on the same day of purchase is a violation of the act and subjects the defendant to punishment under section 9840. "Any person violating any provision of this act shall upon conviction thereof be fined in a sum of not less than \$50 nor more than \$500 at the discretion of the court." Ann. St. 1911, sec. 9840.

No doubt the legislature may by statute "delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Field v. Clark*, 143 U. S. 649, 694. The legislature, however, cannot delegate its power to make laws. The time and manner of paying for the cream purchased can-

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OVERRULED.

, V. RICHARD A.

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ry Board: Bridges.
 ded by chapter 111,
 ontracts for bridges,

State v. Coupe.

culverts and road improvements to the lowest bidder; to reject any and all bids; and, if found to be in the interest of the public, to purchase materials and employ labor and construct bridges and culverts.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Reavis & Reavis, for appellant.

Clarence Gillespie, Amos E. Gantt and Edwin Falloon,
contra.

SEDGWICK, J.

The board of supervisors of Richardson county published a notice to bridge contractors, advertising for bids "for the furnishing of all materials and labor necessary for the construction and completion of all steel bridges that may be ordered during the ensuing year." Pursuant to this notice seven bids were filed with the county clerk, and upon consideration of these bids the board entered an order that "the board of supervisors * * * have concluded to reject all bids and pursue the course followed by the county in the past few years in building its own bridges." This relator brought this action in the district court for Richardson county to compel the board of supervisors to readvertise for bids. Upon trial the district court found generally in favor of the defendants and dismissed the case, and the relator has appealed.

The question presented is whether the county board is authorized to construct bridges for the county, the cost of which exceed the sum of \$500. The whole matter being within the jurisdiction of the legislature, the question depends upon the construction of the statute. In 1905 an act was passed by the legislature relating to bridges, contracts and improvements on roads. Laws 1905, ch. 126. The act is quite comprehensive, containing 19 sections besides the repealing clause. It repeals four sections of the road law of 1879 (laws 1879, p. 120) as they then appeared in

the Compiled Statutes. The last legislature entitled: "An act to amend section 6126 notated Statutes of the state of Nebraska 1909, and to repeal said original section an emergency." Laws 1911, ch. 111. amended was the first section of the act amended is as follows: "The county board has the power to repair or erect all bridges thereto and build all culverts and make in roads the cost and expense of which shall exceed five hundred dollars. And all construction or reparation on bridges and app for the building of culverts and improve and for furnishing materials in connection the cost and expense of which shall exceed dollars shall be let by the county commission board of supervisors to the lowest and be records of each county board pertaining to ments shall be kept in a separate book for purpose. Said book shall be kept indexed complete record of each bridge repaired or the county shall be kept in said book as The date of construction or repair must be The bridge repaired or constructed must be ing its distance and direction from the corner, stating which section corner, name and the township in which the section is must be recorded an itemized statement used, giving the amount, kind, quality of material and date furnished, and said statement sworn to by the person or persons furnishing and an itemized statement of all work formed, giving the number of days, the price per day, and said statement must be the person or persons performing said work in all statements for material and labor shall be by the county clerk, and it shall be deposited in record where they are filed; provided that

shall be kept by the county engineer in counties having such an officer. An itemized statement of all material used in construction of approaches and culverts and of all material used in improvements on roads, and all labor performed must be signed and sworn to by the party or parties furnishing the material and the party or parties performing the labor, and the record of said improvements shall be kept in the same manner as is herein provided in repairing or construction of bridges by the county. A similar record of all bridges or improvements made by contract shall be kept in said book. All bids for the letting of contracts must be deposited with the county clerk and opened by him in the presence of the board of supervisors and filed in the clerk's office." Section 10 of the act of 1905 is: "That the county commissioners or supervisors shall require bidders to bid upon plans and specifications prepared by a competent engineer and adopted by the county board; provided that in any county having a county engineer said plans and specifications shall be prepared by said county engineer, and said board may accept the lowest and best bid and award the contract accordingly or reject any and all bids if the prices submitted are exorbitant or too high or reject all bids submitted for such work. Upon rejection of any bid or bids by said board, it shall have power and authority to purchase the necessary bridge material and employ the necessary labor to construct and repair bridges to be built by the county within one year; the purpose being that said county board shall be vested with power and authority to purchase the necessary material and employ the necessary labor to construct and repair the bridges of the county within one year."

From the title of the amendatory act of 1911 it appears that the legislature intended to amend only the first section of the former act; there is no indication that it was intended to change any other part of the act. It follows that the whole act, as it now is, must be construed together, and the will of the legislature determined there-

tion, if considered by itself, would be construed to mean that, when the cost of the work or improvement would be more than \$100,000, it must be let to the lowest bidder and the work built by the county authorities. But

"Said county board shall be vested with authority to purchase the necessary material and employ the necessary labor to construct and complete the county within one year."

These provisions are apparently inconsistent, and it is difficult to say what is meant by such legislation; but, if the board insisted upon, they must be reconciled. It is impossible to ascertain with certainty what the intention of the legislature was, we must construe the spirit or policy of the act and prior to the act ascertain the probable intention. Two

provisions of the act will not be considered inconsistent if by any possible construction they can be made to agree. Section 19 of the act provides that in certain circumstances the county may enter into a contract, * * * or employ and hire labor." This may indicate that when it speaks of a "contract," it refers to an agreement for a specified improvement, and not to the purchase of material or for performing work is done by the county itself. If

the board of the first section, then, the legislature intended that when the board did let contracts upon the work to the lowest and best bidder, the whole purpose of this clause, the two provisions are consistent. It must be considered that it is a strained and unnatural construction of the act to say that it is better than to charge the legislature with the intent and it is not impossible that such was the intention of the legislature.

In the tenth section, "said board may let the work to the lowest and best bid and award the contract to any and all bids if the prices sub-

mitted are exorbitant or too high or reject all bids submitted for such work," is very much discussed in the brief for the relator. It is said that the words, "any and all bids if the prices submitted are exorbitant or too high," are special and particular, and are intended by the legislature to define when the board may reject bids, so that the subsequent clause, "or reject all bids submitted for such work," can be given no meaning or effect. It is argued that it follows that, unless and until the board finds that the bids are exorbitant or too high, they cannot reject them, and the further conclusion seems to be derived from this reasoning that, if the bids can only be rejected because they are exorbitant or too high, the board must in such case readvertise for bids, and cannot purchase the material and employ the labor to construct bridges. It would be better to disregard entirely the words, "or reject all bids submitted for such work," than to resort to such a construction by inference. As before stated, the act of 1905 repeals four sections of the act of 1879, and the act of 1879 repealed chapter 47 of the Revised Statutes of 1866. Section 16, ch. 47, Rev. St. 1866, authorized the county authorities to "let contracts to the lowest competent bidder, for the improvement of" roads, and the following section indicates that the repairing of bridges and culverts was included in the act. The act of 1879 provided that all contracts should be let "to the lowest competent bidder," and it was the act of 1905 that first introduced the power to purchase material and employ labor by the county authorities themselves. This perhaps accounts for the emphasis given by the legislature to this power of the county board to purchase materials and employ labor. The provision to that effect is repeated in the tenth section, first stating the power given to the board, and then emphasizing it by declaring the purpose and intention so to do. We conclude that the proper construction of the whole act as it now exists, giving as far as possible some meaning to every part thereof, is that the county board may build bridges by entering

Shaw v. Shaw.

d that when they do so they provisions of the statute in that contract to the lowest and best y reject any and all bids, and, est interests of the county, may employ the labor for the con-

the trial court, and the judg-

AFFIRMED.

**LEE, V. EMMA SHAW ET AL.,
DEMANDANTS.**

, 1912. No. 16,700.

REPRESENTATIONS: MATERIALITY. Where against the defendants for damages lined by him because of the misrep- ants concerning the quantity of land lf of the northeast quarter of section evidence showed that the defendants east quarter of said section was a was fractional and contained 172 or owed it was represented that if the alf of the northeast quarter he would or 7 acres more than half a quarter ains, and it further clearly appearing ter above 160 acres was in the north e 92 acres, and that no considerable the south half, as it contained only s misrepresentations made were ma- nsidered by the jury in determining s allowed, and in what amount.

OF DAMAGES. Where it is shown that made as alleged in the petition, that r as they applied to the "south half hat they were believed by the plaintiff iff relied upon them and was injured only a fraction above 80 acres, when acres, held, he may recover his actual

Kuhlman v. Shaw.

damages sustained because of the difference in value in the number of acres actually sold and conveyed as compared with the number of acres bargained to be sold and conveyed.

3. **Trial: INSTRUCTIONS.** The court instructed the jury as follows: "The court instructs you that, before the plaintiff can, in any event, recover a verdict against the defendants, he, the plaintiff, must prove by a preponderance of the evidence that the defendant Henry Shaw was the duly authorized agent of said Emma Shaw to make the sale of said premises to the plaintiff, and that said Henry Shaw did, in fact, make such sale as the agent of said Emma Shaw." *Held*, That the instruction given as above was favorable to the defendants, and, if erroneous, that it could not have been prejudicial to them.
4. ———: ———. Where the court refused to give to the jury, at the request of the defendants, an instruction as follows: "The jury are instructed that if before the plaintiff purchased the land in dispute he inquired as to how many acres were contained in the south half of the quarter section of land, and was informed by Bucholz that it contained 80 acres, or was informed when the conveyance was made in Whittaker's office that this governmental description of the land contained only 80 acres, then, in either case, the plaintiff cannot recover"—but did give of its own motion the following instruction: "No. 6. The court instructs you that if you find from the evidence that the plaintiff at the time he purchased said land knew that the whole quarter section contained about 173 acres, and that about 93 acres thereof were in the north half of said quarter section according to government survey, and only about 80 acres of it were in the south half of said quarter section according to government survey, then your verdict should be for defendants"—*held*, that the jury were properly instructed touching this question, and that it was not prejudicial error, under the evidence, to refuse the instruction requested.

APPEAL from the district court for Richardson county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed*.

C. Gillespie and Edwin Falloon, for appellants.

Reavis & Reavis, contra.

HAMER, J.

The action in this case was brought in the district court

unt by the plaintiff, appellee in this
ihlman, to recover \$664 damages from
pellants in this court, Emma Shaw and
ed to have been sustained by the plain-
purchase by him from the said defend-
ract of land alleged by said defendants
y the plaintiff) to contain between 86
described in the warranty deed given by
w and her husband conveying said land
,"all of the south half of the northeast
3, township 2, range 16 east of the 6th
ed in the petition that the plaintiff re-
representations and assurances of the de-
aw, made to the said plaintiff as the
Emma Shaw, to the effect that the said
of section 3 was a "long quarter," con-
160 acres, and that the south half of
quarter contained more than 80 acres;
st quarter contained 172.73 acres, and
deed for the south half of said quarter
ned and conveyed 86.37 acres, but only
nvey 79.73 acres; that the said north-
ins 172.73 acres, but that said defend-
ary 12, 1907, sold and conveyed to one
ie north half of the northeast quarter
township 2 north, of range 16 east of
ch "said deed, among other things, con-
g warranty: 'Said described land con-
l if, upon a survey of the same, it does
es the said Shaw agrees to deed to the
gh land adjoining this on the south to
at said deed was delivered on the date
nd is recorded in deed book No. — at
records of Richardson county.' " "That
leed last above mentioned the said de-
y to him the south half of the north-
id section, which should contain 86.37
aid defendants owned only 79.73 in said

Kuhlman v. Shaw.

quarter, which is less than the land described in said deed, and less than the lands agreed to be conveyed in their said contract; that plaintiff is entitled to 6.64 acres more under said deed and contract than he now has. Plaintiff avers that the land so conveyed by said contract and in said warranty deed of conveyance is worth at this time \$100 an acre; and that by reason of being deprived of the land so purchased by him under said contract in said warranty deed he has been damaged in the sum of \$664." There was a prayer for judgment.

The defendants answered denying each and every allegation contained in the petition "except what may be hereinafter specifically admitted." They further allege that prior to August 6, 1907, they entered into a contract to sell to the plaintiff the south 80 acres of the northeast quarter of section 3, township 2, range 16, in Richardson county at the agreed price of \$90 an acre, the "entire consideration being \$7,200;" that the intention was only to convey the said 80 acres "at the agreed price of \$7,200, which has been fully paid;" that the intention was not to convey to the plaintiff the south half of said quarter section, but "80 acres of land;" that said northeast quarter consists of lot 3 containing 46.67 acres, lot 4 containing 46.04 acres, and that the south part of the northeast quarter contains a slight fraction more than 80 acres; that said two lots 3 and 4, being the north forties of said northeast quarter, had previously been conveyed, as the plaintiff well knew, to August Bucholz (the deed to Bucholz describes them as lots 1 and 2); that the plaintiff well knew that he was only buying the remainder of the quarter which had not already been conveyed to Bucholz; that the line dividing the land conveyed to Bucholz from the land conveyed by the defendants to the plaintiff had been established according to the government survey, the north half containing over 92 acres and the south half containing a little over 80 acres. There was no reply.

A trial was had upon the issues joined before Judge Pemberton and a jury. A verdict was found for the plain-

man v. Shaw.

for a new trial was filed by the
d, and thereupon the plaintiff
amount of the verdict and the

the south part of the quarter con-
evidence shows that the north
1 and 2 as the case may be),
7 and 46.04 acres. It appears,
rd statement of the defendant
aser Kuhlman that the quarter
correct; but whether he informed
knew concerning the amount of
th part of the quarter is some-
r discussion later in the case.

appellants that the court erred
action upon its own motion as
ucts you that, before the plain-
er a verdict against the defend-
st prove by a preponderance of
dant Henry Shaw was the duly
Emma Shaw to make the sale of
tiff, and that said Henry Shaw
as the agent of the said Emma
the defendants' counsel in their
ars positively that Henry Shaw
e the sale of this land, and that

when Kuhlman was at her house she asked \$90 an acre
for the land.' It is claimed that the husband must have
been authorized by her in writing. The instruction in
question seems quite favorable to Mrs. Shaw. It clearly
puts the burden upon the plaintiff, and seems under the
evidence to be wholly without prejudicial error to the
defendants' case. Mrs. Shaw cannot claim and receive
the benefit of her husband's persuasive and effective con-
versation without being liable for it. If the testimony of
the witnesses for the plaintiff is true, Mrs. Shaw received,
and is yet holding, the fruits of her husband's skilled
tongue. The claim of counsel for the defendants assumes

the testimony of Shaw and his wife to be conclusive concerning the alleged fact that the husband was not his wife's agent in bringing about the sale, but this ignores the testimony of Kuhlman, Woodring, and Wamsler, and is seemingly an unwarranted assumption that there was nothing relating to this part of the case to submit to the jury. In this case the agency was attempted by the defendants to be made a question of fact, the determination of which rested upon conflicting testimony, and it would seem therefore to be proper that this issue should be given to the jury; but, if not, then the defendants could not have been prejudiced by it, as submitting the question to the jury gave the defendants a chance to win, which they could not otherwise have had.

The defendants claim that the court erred in refusing to give to the jury at their request instruction No. 4, as follows: "The jury are instructed that if before the plaintiff purchased the land in dispute he inquired as to how many acres were contained in the south half of the quarter section of land, and was informed by Bucholz that it contained 80 acres, or was informed when the conveyance was made in Whittaker's office that this governmental description of the land contained only 80 acres, then, in either case, the plaintiff cannot recover." It is contended by the defendants concerning this instruction that, at the time the deed was drawn in Whittaker's office, it was there stated in the presence of Kuhlman that he was buying 80 acres at \$90 an acre; also, that Mrs. Shaw was there present, and, if Kuhlman had bought 86 or 87 acres for \$7,200, it was then incumbent upon Kuhlman to inform Mrs. Shaw of this fact, and not to keep quiet and by his silence perpetrate a fraud upon her. As to what was said in Whittaker's office there is a dispute and the witnesses do not agree, and this question was submitted to the jury along with the other issues in the case, and they found against the defendants. The sixth instruction given by the court upon its own motion seems to cover the exact question contained in the request of the defendants. By

Kuhlman v. Shaw.

the jury were told that if the plain-
hole quarter section contained about
about 93 acres thereof were in the
rter section according to government
t 80 acres of it were in the south half
n according to government survey,"
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tion fairly presented to the jury the
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the description. There seems to be
complaint because of the failure of
instruction requested.

s that the plaintiff suffered damages
representations of the defendants.
at Kuhlman went to Shaw's house,
Kuhlman talked together about the
ises in the presence of Shaw's wife.
of the defendants, therefore knew
negotiating for the sale of the prem-
, the purchaser, and Shaw met down
d Shaw continued the negotiations,
hen told Kuhlman that if he bought
n) would not be paying \$90 an acre
rtheast quarter was a long quarter,
an) bought the south half he would
is perhaps immaterial whether Shaw
t his representations were untrue.
Neb. 133; *Carter v. Glass*, 44 Mich.
n, 122 U. S. 575; *Johnson v. Gulick*,
Pips v. Jones, 12 Neb. 213, it is said:
out knowing whether his statements
is an assertion as to any particular
he other party has relied, the party
er case, will be entitled to relief"—
rds, 13 Pet. (U. S.) *26, *38; *Turn-*
rob. Eq. (S. Car.) 14; *McFerran v.*
S.) 281. This court quotes with
ast-named case that "he who sells

property on a description equity to make that description in a material point, although by mistake, he must rely on *Phillips v. Jones, supra*.

Shaw, the husband, had no representations unless he knew the facts. He cannot make them without knowing the facts. His wife received the benefit of the warranty and ought to give up the benefit. See *Allison, 2 East (Eng.)* either to aver or prove the facts. The C. J., said: "But, here, it is the defendant's knowledge of the facts of the exportation were struck out and it would be sufficient to entitle the plaintiff to the breach of the warranty and to put the other into security as to the facts. It is giving him a warranty of the facts or not the seller knew it." And Le Blanc, J., said: "The fact of the defendant's knowledge of the wine was unfit for sale, and there is no difference in the cause. Therefore it may be struck out and it is an averment and proof of scientific cases: *Beeman v. Butler*, 583; *Johnson & Grimes v. Wilcor*, 30 Me. 170; *Ives v. Carter*, 24 Conn. * is instructive, while that resembles the instant case.

It is claimed by counsel that the wife sold the land herself, and not the husband, but the evidence clearly shows that her husband was active in the transaction. He was negotiating with Kuhl and he has done a large share

Kuhlman v. Shaw.

a condition of things by which the plaintiff believing that the representations made by the defendant were untrue, and that the plaintiff was true, and that he bought the land on the truth of the representations was injured because of the fact that he got 7 acres of land, which he understood he was to get 10 acres. He only got a fraction more than he was entitled to by reason of the testimony that the representations were untrue. Such representations were not true, and the plaintiff believed them to be true, that the plaintiff relied on them and was injured. *Johnson v. Gulick*, 101 Neb. 100; *Riggs*, 37 Neb. 797; *Upton v. Levy*,

the north and west boundary of the quarter may be fractional, and therefore may contain more land than is given to other quarter sections in township, and are sold as surveyed sections in the land offices. The northeast quarter was such a quarter section, and the northwest quarter has been divided into lots, 46.04 acres in the northwest, and the other, making the north half of the northwest quarter contain 92.71 acres, according to the survey (defendants' exhibit 1), and the northwest quarter, according to the same copy, 79.58 acres. The parties stipulated that the south part of the northwest quarter is 80.29 acres.

With force that "the south half of the northwest quarter is equivalent to "all of the south half of the northwest quarter," and that one set of words constitute the same thing as might be conveyed by the other. The language used in the deed is "the south half of the northeast quarter of section 3" and the additional words "all of" before "the northeast quarter of section 3" added nothing of the words used, but we can see that the words may have been used to in-

Kuhlman v. Shaw.

duce the purchaser Kuhlman to believe that he was getting the full half of all the land included in the quarter section, instead of the smaller quantity of land properly designated by "the south half of the northeast quarter," and which words would not properly include part of the lots which together made the north half of the northeast quarter. The way of using this phraseology was one of the facts for the jury to consider in determining the good faith of the defendants. Kuhlman testified that he went to Shaw's house, and that Mrs. Shaw said her husband was asleep, and she went upstairs and got him, and that he came down and they talked about the sale of the land in her presence, and the price, and that he told them that \$90 an acre was more than he was willing to give, as there were no improvements on the land, and that he stayed there until it was nearly noon, and that he was invited to dinner, but excused himself on the ground that he had other business to attend to, and that in the afternoon, about 3 o'clock, Shaw met him down town and said to him that he had better buy the land, that Shaw said, "Now, look here Kuhlman, that land won't cost you \$90 an acre;" that Shaw then explained that it was a fractional piece and that he got half of the quarter, and thereupon that Kuhlman said, "If that is so, I will take it." "Well, he said that was a big quarter, and this half quarter would overrun 5 or 6 acres, he said." Then Kuhlman told him that he would take it. He also testified that, if Shaw had not said that it overran 5 or 6 acres, he would not have bought it. Kuhlman testified that Woodring and Dan Wamsler were present and heard the talk in the afternoon between Shaw and himself. They seem then to have gone to Whittaker's office to have the deed drawn, and Shaw said: "Now, I have got to phone for my wife to sign the deed." Woodring and Wamsler corroborated the evidence of Kuhlman. Mrs. Shaw, one of the defendants, corroborates the testimony of Kuhlman to the effect that her husband was out with Kuhlman, and that he made the arrangement for her to come up and make the deed. He

APPEAL from the
WILLIS G. SEARS, JUI

Charles Haffke, for :

S. I. Gordon, contrac

HAMER, J.

The plaintiff Landn
defendant, the city of
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the office of the clerk
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FRED M. FITZGERALD V. STATE OF NEBRASKA.

FILED MAY 13, 1912. No. 17,506.

Kidnapping: SUFFICIENCY OF EVIDENCE. The evidence examined, and held insufficient to support the verdict.

ERROR to the district court for Hayes county: **ROBERT C. ORR, JUDGE.** *Reversed with directions.*

P. W. Scott, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

HAMER, J.

The plaintiff in error, Fred M. Fitzgerald, hereinafter

called the defendant, was informed against in the district court for Hayes county on the 13th day of November, 1911, in an information by the county attorney, who charged in the information: "That on the 9th day of September, 1911, in the county of Hayes, and state of Nebraska, Fred M. Fitzgerald, then and there being, did unlawfully, maliciously and fraudulently lead, take, entice and carry away one Alice Barrett, then and there being a female child under the age of eighteen years, to wit, the age of sixteen years, with the intent of the said Fred M. Fitzgerald unlawfully to detain said child from one W. B. Barrett, the father of said child, and then and there having the legal custody of said child, Alice Barrett, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The information was prepared and filed under section 20 of the criminal code, which reads: "Any person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or decoy, or entice away, any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, or other person having the lawful charge of such child, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

Alice Barrett is shown by the evidence to have been a young lady 16 years old at the time of the commission of the alleged crime. She resided with her father and mother in Hayes county, Nebraska. Against the expressed wish of her father, she had a lover, Fred M. Fitzgerald. They had been lovers about four months. They became engaged to be married. As the father objected, they planned to elope. On the evening of September 9, 1911, the young lady left home with her brother and sister to go to a dance. The brother seems to have known that Alice was to meet Fred on the way to the dance. Alice and Fred had met in the same way once before. The brother seems to have had knowledge of the friendship entertained by

Alice for Fred. On the way to the dance Alice got out of her brother's buggy and got into a buggy with Fred. She was acting voluntarily, and seemingly without her brother's opposition. Fred and his prospective wife drove to North Platte, and from there they went by train to Missouri, where they applied for a marriage license, which was refused. Then they went to Nebraska City, where they procured a license, and they were married on September 11, 1911, and then they returned home to the residence of the husband in Hayes county, and about a quarter of a mile distant from the home of the bride's parents. When the bride's mother telephoned them to come over to the house, they both went over. There was no objection from Fred.

An examination of the section under which the information was filed shows that the criminal intent necessary to make the defendant guilty in such case is "to detain or conceal such child from its parent or parents, or guardian, or other person having lawful charge" thereof. The facts show that it was a case of eloping for the very natural purpose of getting married. The alleged criminal act was not done "maliciously or forcibly or fraudulently." Neither was it done to detain or conceal the young lady from her father. The going away was voluntary on both sides, so was the getting married, so was the returning; and, when the mother invited them home, the young husband and wife both appeared together at the paternal residence. They announced their marriage. There was no detention or concealment from the beginning to the end. The court is unanimously of the opinion that the section referred to is wholly inapplicable to this case.

The judgment of the district court is reversed and the case remanded, with directions to dismiss the information and discharge the defendant.

REVERSED.

J. ARTHUR TILLSON, ADMINISTRATOR,
HOLLOWAY, A

FILED MAY 16, 191

MOTION to recall mandate i
481. *Motion overruled. Costs*

PER CURIAM.

Plaintiff's motion to recall t
judgment is overruled.

The trial court should proc
fense stated in the opinion u
petent evidence as may be offe

Our judgment does not inte
the trial court to take the ad
finds it advisable to do so.

All other issues are deter
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The plaintiff's motion to re

HUGH MCCAFFREY ET AL., APPL
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FILED MAY 29, 1

OPINION on motion to modi
184. *Motion overruled.*

PER CURIAM.

A motion has been made b
tain expressions used in the

184) relative to the meaning of the clause "record owners of a majority of the taxable property upon such street or alley to be in said district." Comp. St. 1911, ch. 12a, sec. 1. The actual controversy in the case is whether the city had power to make a special assessment lying outside of an improvement district for paying for improvements within the district. It is decided, in substance, that in order to warrant a levy for street improvements (outside of the legal limits in the city) there must be a petition signed by a majority of the record owners in the proposed district, that a street improvement district must be created, that the levy of such improvement must be confined to property within the district which has been specially benefited by such improvement, and that no taxes for such improvement be levied on property outside of the district. It hardly necessary to say that not all arguments made and advanced in the course of the written opinion in this other case are judicial determinations. It is frequent that lawyers argue propositions and matters not absolutely necessary to the final result of the case. Unless the judgment of the court is on such points, the expression of views in regard to them in an opinion may be regarded as argumentum ad hominem, pressing tentatively only the views of the writer of the opinion in regard thereto.

In this case the points actually decided and expressed in the syllabus, which covers the result of the Propositions advanced in the opinion not actually decided by the judgment pronounced are not to be regarded as judicial determinations or as legal precedents.

The motion is, therefore,

BARNES and ROSE, JJ., adhere to former

CREIGHTON UNIVERSITY, APPELLANT, v. CITY OF OMAHA,
APPELLEE.

FILED MAY 29, 1912. No. 16,701.

Municipal Corporations: GRADING STREETS: DAMAGES: APPEAL. Section 213, ch. 12a, Comp. St. 1909, commonly called the Omaha charter, prescribes the method of taking appeals from the action of the city council in awarding damages to property owners, caused by the grading of streets in said city, and a compliance with the provision that a petition be filed in the district court within 30 days after the final order of the council assessing damages is necessary to the taking of an appeal.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

T. J. Mahoney and J. A. C. Kennedy, for appellant.

John A. Rine, W. C. Lambert and Clinton Brome, contra.

REESE, C. J.

The following facts are shown by the transcript in this cause: On the 4th day of August, 1908, the city council of the city of Omaha passed an ordinance "establishing the grade of Twenty-fourth street from Burt street to Cass street in the city of Omaha." For the purpose of the decision of the question presented, it is not deemed necessary to notice the provisions of the ordinance more than to say that by it the grade of Twenty-fourth street within the points named appears to have been duly established; the ordinance taking immediate effect. On the 16th day of March, 1909, another ordinance was passed, and later approved, declaring the necessity of grading Twenty-fourth street from Burt street to Cass street, and appointing three members of the city council appraisers to assess and determine the damages, if any, to the property owners which might be caused by such grading, the city to pay one-half the cost and expense thereof. By the

JANUARY TERM, 1912.

Creighton University v. City of Omaha.

members were named as assessors and determine the damages might be caused by the passage, provided that the ordinance provided that the ordinance passage. Presumably on the 1st though the date of filing led to the committee on appeal for damages in the sum are set out in the claim. On the 1st met in regular session, appraisal of damages to plaintiff assessing the damages at \$4000 at the time of making entry in the record that an appeal committee or what its action given to plaintiff. The report by the council. On May 25, 1912, session, when the mayor received the report of the committee. The report was filed and approved by the council (presumably), a notice of appeal by the council and city clerk, at the expense of its service. It is probably necessary. A transcript of the proceedings was prepared by the city clerk and filed in the office of the clerk on the 1st day. On the 2d day of June, 1912, the city of Omaha filed in the district court to dismiss the appeal, and on the 3d day the court upon the grounds required by section 213 of the charter of Omaha." On the 2d day of June the city filed its petition. On the 3d day the motion to dismiss was sustained. Plaintiff appeals. The case has been elaborately briefed and the question presented, it is the cause turns upon the pr

tions 212 and 213 of the Omaha charter in force in 1909 (Comp. St. 1909, ch. 12a). Section 212 need not be here copied, as, so far as it relates to the subject before us, it simply gives the right of appeal in cases of this kind. Section 213 is as follows: "Whenever the right of appeal is conferred by this act, the procedure unless otherwise provided shall be substantially as follows: The claimant or appellant shall, within twenty days from the date of the order complained of, execute a bond to such city with sufficient surety to be approved by the clerk, conditioned for the faithful prosecution of such appeal and the payment of all costs adjudged against the appellant. Said bond shall be filed in the office of the city clerk. It shall be the duty of the city clerk, on payment or tender to him of the cost of the transcript, at the rate of ten cents per hundred words, to prepare a complete transcript of the proceedings of the city relating to their decision thereon. It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within thirty days from date of the order or award appealed from, and he shall also file such transcript before answer day. The proceedings of the district court shall thereafter be the same as on appeal from the county board. Any taxpayer may appeal from the allowance of any claim against the city by giving a bond and complying with the foregoing provisions. Provided, that the foregoing provisions shall not be so construed as to prevent the city council from once reconsidering their action on any claim or award upon ten days' notice to the parties interested."

The inquiry arises as to what step it is that is to be taken by an appellant in order to confer jurisdiction upon the district court? We take it as not to be questioned that the jurisdiction is obtained by the filing of some pleading or process therein. As appears therein, the section under consideration provides: "It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within

thirty days from date of the order or award appealed from," and he shall file the transcript before answer day. Thereafter the proceedings shall be the same as appeals from the county board. This provides a departure from the law of ordinary appeals. It is not the filing of the transcript that gives jurisdiction, for it may be filed at any time before answer day. The petition is the first filing to be made and that must be filed within the 30 days named. Until that is done the case is not in court nor within its jurisdiction. This seems to be the plain provision of the section. It is within the power of the legislature to make the change from the usual course of procedure. The provision is a special one, probably enacted for the purpose of expediting the settlement of questions which may arise in the matter of grading and paving streets. We can see no way of escape from its direction.

Our attention is called to the use of the word "substantially" near the beginning of the section. We are unable to see how it can be construed to mean that the requirement that the petition shall be filed in the district court within 30 days after the order of the council, which was made on the 18th day of May, could be even substantially complied with by filing the petition on the 2d day of the following December. True, the transcript was filed within the 30 days, but we are unable to see how that could aid plaintiff.

Defendant insists that preliminary to an appeal in any case of this kind a written protest should be filed by an abutting lot owner before the adoption of the report of the appraisement of damages, as provided by section 116 of the charter. As we have seen, the report of the committee was presented to and adopted by the council at the same meeting, and, so far as appears, in the absence of all notice to or knowledge of plaintiff. We refuse to consider that question. The ordinary rules of common fairness appear to have been grossly violated by the action of the council, and, if it is to be held that the right of appeal may be cut off in that way, it must be in some other case, not in this.

Upon the sole ground that the law requires the filing of a petition to be the first and jurisdictional act within the 30 days prescribed, and the petition was not so filed, the judgment of the district court dismissing the appeal must be, and is,

AFFIRMED.

LETTON, J., not sitting.

FAWCETT, J., concurring.

To hold as contended for by plaintiff would be to hold that the filing of the transcript is what gives the district court jurisdiction. I think that ought to have been the law, but it is not; and the fact that this method of taking an appeal to the district court stands alone in our statutes cuts no figure, as it is clearly within the power of the legislature to provide a different course of procedure in one class of cases from that provided in others. Now, what is the meaning of section 213, which, after providing that the appellant shall within 20 days execute a bond to the city, conditioned for the faithful prosecution of the appeal, and file the bond with the city clerk, and that it shall be the duty of the city clerk to prepare a transcript, further provides: "It shall be the duty of the claimant or appellant to file a petition in the district court *as in the commencement of an action* within thirty days from date of the order or award appealed from, and he shall also file such transcript *before answer day?*" (The italics are mine.) To my mind, it is clear that by this statute the filing of the petition is the commencement of the action in the district court; or, if you choose to put it in another way, the institution of the appeal in that court. If the legislature had intended that the filing of the transcript should constitute the institution of the appeal in the district court, it would have reversed the order of filing the petition and transcript, and would have provided within what time *after* the filing of the transcript the petition should be filed. If the filing of the petition is not the commencement of the appellate proceeding in the district

How are you going to determine when the could be filed? The statute says it must be answer day. What fixes the answer day? The course, as there is nothing to answer until a ed.

ion in section 213 reads: "It shall be the claimant or appellant to file a petition," etc.

that is the same as if it had read: "The appellant shall file a petition in the district. In other words, where the statute says it *uty* of the appellant to do a certain thing, it s if it had said, he *shall do* that thing.

l that section 116 is the one which permits. It does permit appeals but it does not pre- cedure. Section 212 also permits appeals, ills to prescribe the procedure. Then comes nd prescribes the procedure under both sec- ovides: "Whenever the right of appeal is this act, the procedure unless otherwise l be substantially as follows." The words, 'wise provided," must in reason be held to otherwise provided in this act.

ery much to prevent a hearing of this case ts, and would be glad if I could see my way ain plaintiff's contention, but it cannot be distinctly and definitely amending section e have no right to do.

J., dissenting.

that the plaintiff executed its bond for ap- as duly approved and filed, and also procured and filed the same in the district court, all days. It failed to file a petition within the or this reason the appeal was dismissed. We keep a party out of court upon a technical ie has in good faith substantially complied ute. The opinion in this case is placed en-

tirely upon the section of the statute, which is 213 of the Omaha charter (Comp. St. 1909, ch. 12a). This section purports to provide the proceedings in the case of appeals. It says that the claimant or appellant *shall* execute a bond, etc., within 20 days. The bond must be approved by the city clerk and *shall* be filed in his office. Then it is the *duty* of the city clerk to make a transcript, and it is the *duty* of the appellant to file a petition in the district court, and he *shall* also file a transcript. The question is, what constitutes the appeal? Of course, it is not the duty of anybody to appeal, that is optional; but, after one has appealed, then it is his duty to file pleadings, and it seems to me that in providing that it would be the duty of the appellant to file a petition within the 30 days it is assumed that the appeal is taken by the other proceedings. If he wants to take an appeal he *shall* give the bond, have it approved, and *shall* file a transcript. If it is his duty to file a petition, that cannot be a necessary part of the appeal, because it is not the duty or any part of the duty of anybody to appeal from a decision, so I conclude that the statute intends that he has taken his appeal by other steps, and that, the case being appealed, it is his duty to file his pleadings. If filing the petition in the district court is taking an appeal to the district court, it is a novelty, no other such instance being found in our statute. There are, however, many instances of taking an appeal by filing a bond in the trial court, taking a transcript and filing it in the district court. The question is difficult; it is a peculiar statute. The appellant has given the bond and filed the transcript within time. We therefore should construe the statute so as to allow a hearing upon the merits rather than to defeat the action upon a technicality.

HAMER, J., concurs in this dissent.

Fitzgerald v. Union Stock Yards Co.

where he was working. Under the issues and evidence in the particular case, the instruction was devoid of prejudice.

3. ———: ———: NEGLIGENCE: QUESTION FOR JURY. The decedent was killed while making a coupling of an engine to a train of cars standing upon a railroad track. If the train of cars was unmolested, as he had a right to expect, he was working in a safe place and was guilty of no negligence in working there. There was evidence tending to show that a train standing upon a track, with an engine in front, was, under the customs and rules of railroading, a signal or warning that the train was "a live train" and should not be molested or other cars coupled on to it, unless so directed by the crew in charge of the standing train. This was a question of fact to be solved by the jury. If such rule did exist, the butting of a train of many cars against such train for the purpose of coupling onto it, without the consent from the crew of the standing train, would be an act of negligence.
4. Remittitur. Under the evidence, as referred to in the opinion, the judgment of the district court for \$4,000 is held to be excessive, plaintiff having already received \$4,400, and a remittitur of \$300 is required, upon failure of which the judgment is reversed. If the remittitur is filed, the judgment for \$3,700 will be affirmed.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed on condition.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Smyth, Smith & Schall, contra.

REESE, C. J.

This action was instituted in the district court for Douglas county. There have been two trials. On the first trial the court instructed the jury to return a verdict in favor of defendant, which was done and the cause was dismissed. From that judgment plaintiff appealed to this court, and upon a hearing here the judgment was reversed and the cause remanded for further proceedings. The case is reported in 89 Neb. 393. The facts as to the accident which caused the death of Martin Fitzgerald, and

tion was brought, are sufficiently and need not be repeated here. The jury returned a verdict in favor of \$8,100. On the hearing of the the court required a remittitur of of the verdict, or that upon failure a new trial would be granted. titur, and judgment was rendered appeals.

Plaintiff's right to maintain this action, agreement with the Chicago, Burlington and North Western Railroad Company and the receipt of the it, was adjudicated in the former action thereon has become the law of the case and is considered settled. The subject will

be a witness to the death of decedent. immediately thereafter—perhaps or possibly seconds—and removed back between the cars. Death must have occurred, as the head was crushed and the

The indications are that the arrangement upon the scene must have been after the accident. The Burlington car was at the north end of the string of cars and was to be attached. It is not known if that crew, except decedent, was not in sight of defendant's crew, front car and the Burlington engine coupling; the coupling of that car having been disabled. He was evidently in the position to his employer, and, if the cars were in place. At that moment a train was sent by an engine of defendant, and a crew, was sent against the rear of cars, of which the disabled car was the first, with force as to drive that car against the engine and instantly killing decedent.

It is urged that the fact of disabled car and the Burlington defense of contributory negligence part of the case, while the testimony conflicting, there was evidence showing that, where a train is standing locomotive in front of it, this is warning to those in charge of it or in any way molest the train or of the crew in charge of such train or standing in front renders it a train," and which must not be true, and of that the jury were precedent was justified in believing he would not be molested and he could safely couple the car and engine and make it therefore he would not be guilty of negligence. If by the same evidence that such a rule did exist, and the train saw the engine in front, and authorizing them to couple onto it and drove their train, consisting of cars against the standing train in violation thereby the decedent was killed in duty, this would support a finding of contributory negligence on the part. This question was also a determination of the jury, and under the circumstances, we cannot find evidence of contributory negligence and there is sufficient to sustain a finding of care on the part of defendant.

In the first instruction given to the jury on the issues presented by the pleadings, the court used this language: "Martin was injured and came to his death in consequence of a train of cars under the control of the defendant, the cars being intentionally propelled by the engineer of cars that were in close proximity to the car in which Martin was riding."

ler the control of the servants of
 was killed by the impact and
 on his part, while he was in the
 ard one of the cars to the engine
 direction of those in charge of the
 was working." This part of the
 ly objected to upon the ground
 of contributory negligence from
 rue that all questions of fact at
 d evidence are for solution by the
 here is nothing in either which
 finding than that contained in
 ould be no possible prejudice in
 hereinbefore said, there was no
 negligence on the part of the de-
 ny facts proved from which such
 red. The further language in the
 lent occurred while the decedent
 ng the cars "with a chain, under
 a charge of the engine and cars
 is also objected to. We are un-
 ction is meritorious. The proof
 ent was acting within the line of
 llegal in the answer that "when
 aid railroad company, of which
 approached the north end of said
 y were about to remove from the
 discovered that the drawbar was
 th end of said string of cars and
 t be moved until a chain was at-
 hat after said chain was attached
 een the cars for the purpose of
 making the coupling, and, while
 npt to make said coupling, said
 of another train operated by the
 against the south end of said
 gainst the said engine, and the
 t and crushed between said car

Fitzgerald

and engine, causing the decedent was working on a gently and carelessly displayed, any signal or informing other or disturb the train upon working." If, under was any question as to decedent was engaged averments by defendant language used in the

The next, last and most by this record is that ment of the district court the former decision is paid to the parents of his mother, the sum of record that the relief her the sum of \$2,200. of an insurance for which not think it should be paid as damages is entered trial from which this decedent died, leaving three children surviving her, but years, the youngest being the trial. The father and yielding little for decedent appears to have educated young man, to a great extent, support what his earnings from shown to make it appear remaining at home with Complaint is made that father is not sufficient the support of the family established, as well as

tion Stock Yards Co.

administratrix *de bonis non* of
ed as to the condition of her
wer was: "My father has not
ears." She was then asked as
his health, and she answered:
ross-examination she was not
alth of her father, the inquiry
had contributed, or failed to
The way was open for further
but no questions were asked.
ot it as fact that he is not well
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that the damages were \$8,100
in the railroad company, which
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ges and ability of the surviving
he \$4,400 added to the sum of
unt of the verdict. From these
to believe that it was the pur-
whole damage was the sum of

istrict court will therefore be
anded for further proceedings
50 days enter in this court a
a remittitur is filed, the judg-
will be affirmed for \$3,700. The
ixed to plaintiff, all other costs

AFFIRMED.

LUOY J. MILLER, APPELLANT, V. JACOB MILLER, APPELLEE

FILED MAY 29, 1912. No. 16,719.

1. **Divorce: ALIMONY.** In an action for divorce and alimony, the trial court should consider all of the facts in evidence as to the property rights of the parties, the sources from and the manner in which their property was accumulated, and may exercise reasonable discretion in dividing the property between them.
2. **Appeal: TRIAL DE NOVO: ALIMONY.** When a party appeals from that part of a decree relating to the division of property only, this court will try that issue *de novo* upon the record, and if the decree of the district court is found to be in substantial accord with justice and equity it will be affirmed.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland, for appellant.

Wilcox & Halligan, contra.

BARNES, J.

This action was brought in the district court for Lincoln county for a divorce and alimony. The plaintiff had the judgment; but, being dissatisfied with the amount of the property awarded to her as alimony, has prosecuted this appeal.

Neither party assails that part of the decree granting plaintiff a divorce, but it is contended by her counsel that the decree, so far as it relates to the question of alimony, is unjust and inequitable; that it does not properly take into consideration the amount of money contributed by plaintiff to or paid by her for the purchase of a part of the common property, and this is the only question presented for our determination.

A trial *de novo* on the record brought here upon the appeal discloses that plaintiff and defendant were married in Cass county on the 14th day of February, 1884;

that on or about the 1st day of April of that year they moved to and settled upon the north half of section 11, township 16, range 27 west, in Lincoln county, Nebraska, they having previously entered that tract of land. In due time they made their final proofs and received a patent therefor under the laws of the United States. They continued to live upon the tract of land above described, and cultivated and improved it to some extent until about the 1st day of January, 1894, when the defendant was elected sheriff of Lincoln county, and they thereupon moved to North Platte, and the defendant held and filled the office of sheriff for a period of four years. Shortly after the expiration of his term of office they moved back to the homestead. For a period of nearly three years after leaving the sheriff's office the defendant was employed by the Union Pacific Railroad Company, and for a portion of that time was deputy United States marshal in the state of Wyoming. Before he was elected sheriff, and while residing upon the homestead, defendant supported his family by working at his trade as a blacksmith. During the period of his employment by the Union Pacific Railroad Company and as deputy United States marshal, defendant received a salary of from \$60 to \$75, and finally \$100 a month. During a part of this time the plaintiff remained upon the homestead, and a part of the time lived in Cheyenne, Wyoming, with the defendant. Finally, in the year 1903, the parties returned to the homestead and occupied it as such until the commencement of this action, when they differed upon matters relating to religion, and the defendant left their home and has since resided with a relative in Lincoln county. The plaintiff continued to live upon the homestead, and still makes it her home. When the parties first moved to the homestead the plaintiff had a stove, some cooking utensils, some bedding and dishes, and six cows. The defendant had one span of ponies, one wagon, his blacksmith tools, three cows, one heifer, some notes and school orders, and some money amounting to about \$400. The defendant, with his

earnings as a blacksmith, as sheriff of Lincoln county, as a detective for the Union Pacific Railroad Company, and deputy United States marshal of Wyoming, kept the family, improved the homestead, and with a portion of his earnings purchased other lands, then of little value, and which he owned at the time of their separation, amounting to 1,000 acres, situated in Lincoln county. Three children were born to the parties, and two of them were minors at the time this action was commenced. At the time of the marriage the plaintiff had a minor son named Frank Brazelton, the issue of a former marriage, who was raised and educated in the defendant's family. About the year 1899 the defendant built a good substantial frame dwelling upon the homestead, and later on built a store building, barn and other outbuildings upon the premises. It further appears that in August, 1905, the defendant had become indebted by reason of making the improvements upon the homestead and for living expenses to an amount of about \$3,000. To develop a deposit of tripoli situated upon a part of his land, the defendant also borrowed \$2,000 from one R. C. Peters, to be repaid in five years, and to secure the payment thereof the plaintiff and defendant executed and delivered to Peters a mortgage covering the homestead, and all other lands owned by the defendant, except a 200-acre tract in section 15, township 16, range 27; and, in order to pay such indebtedness, the defendant desired to sell the homestead. It further appears that the plaintiff had inherited 80 acres of land from her father, which was situated in Cass county; that she thought it was better to sell her Cass county land and use the money for the purpose of paying their debts, and thus retain the homestead. To this the defendant consented, and plaintiff thereupon sold her land in Cass county for \$5,000, and turned the money over to the defendant. It is contended on her part that with this \$5,000 she purchased the homestead, while defendant contends that she gave him the money to pay the debts, and desired him to secure the repayment of it by

homestead to her, which was accordingly the time this action was commenced the title to the 320-acre homestead.

From which appeal is prosecuted, gives the homestead, consisting of 320 acres of land, buildings and improvements, valued at the \$10,000, and personal property and money \$11,312, while the defendant is given 1,000 acres of land, valued at \$6,800, and personal property amounting to \$1,187, making a total of \$7,987, and is required to pay the Peters mortgage of \$2,000 and the costs of this case. The decree also provides that the defendant's part of the real estate be sold for that purpose. It thus appears that plaintiff's share of the property amounts to \$11,312, while the defendant has only \$7,987 worth of property, consisting of 1,000 acres of land and some personal property; and she is required to pay the costs of this litigation and the mortgage of \$2,000, so that there will remain to her only a tract of land worth about \$5,000. Counsel for the defendant contend that the fact that she purchased the homestead with the \$5,000 which she received for her share of the land, entitles her to a greater share than she is given by the decree. It appears from the record, however, that the defendant used the money for all of their debts except the Peters mortgage of \$2,000, and turned the balance over to the plaintiff, which was used to complete the improvements on the homestead, to aid the plaintiff's son, by her former husband, in business ventures to the amount of \$400 to \$500, and for the living expenses of the family. It would therefore seem that in equity and good conscience the homestead, with its increased value, sufficiently compensates her for the money she contributed for their common good.

We are therefore of opinion that the decree of the district court was just and equitable, and it is in all things affirmed. We are also of opinion that the record presents

Clark v. Hannafeldt.

a litigable question, and for that reason each party will be required to pay the costs which he has incurred in this court.

AFFIRMED.

REESE, C. J., dissents.

136-558

JAMES SAMUEL CLARK, APPELLANT, V. AUGUST HANNAFELDT ET AL., APPELLEES.

FILED MAY 29, 1912. No. 16,892.

Mortgages: FORECLOSURE: REDEMPTION. One who takes and records a deed to real estate (subject to a mortgage) in the name by which he is generally known and transacts all of his business, and thereafter pays no part of the mortgage debt, no taxes upon the land, and for his default the mortgage is foreclosed and the premises are sold in a proceeding against him by that name, cannot, after the lapse of nearly ten years, maintain an action to redeem against the grantee of one who purchased the land at the foreclosure sale, relying upon the validity of the decree, on the sole ground that he was not sued in the foreclosure proceedings by his full Christian name instead of the name by which he was designated in his deed.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. Affirmed.

M. F. Harrington and W. R. Butler, for appellant.

Joseph Wurzburg, W. A. Meserve and J. F. Green, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Knox county denying the plaintiff the right to redeem the land in question herein from a decree of foreclosure rendered by the district court of that county at its September, 1895, term, and from a sale of the mort-

Rayles v. Rayles.

that decree had and made in December appears that in the foreclosure proceeding was sued by the name of J. S. Clark, by that name was made by publication. It is his true name is "James Samuel" the sole ground upon which plaintiff seeks redemption. The findings and decree are correct, and appear to be fully sustained by the facts of this case, as found by the court. The decree is clearly within the rule announced in *McClure*, 86 Neb. 452, and *Stratton v. McClure*, 86 Neb. 452.

The judgment of the district court was right,

AFFIRMED.

WILLIAM V. ADELIA RAYLES, APPELLANT.

MAY 29, 1912. No. 16,692.

In an action for divorce and alimony, the trial court found all the facts in evidence as to the property of the parties and render such decree as may be just and equitable. The question whether or not a decree in divorce should be granted them several years before had settled their property to that time.

The court held that the decree of divorce and for alimony by the district court is not erroneous.

The district court for Cass county:
JUDGE. *Affirmed.*

Sullivan & Squires, for appellant.

and Mockett & Peterson, contra.

for divorce and alimony. A decree

Rayles v. Rayles.

was rendered dissolving the bonds of matrimony, and alimony was awarded defendant in the sum of \$1,000. Defendant appeals.

The parties were married in Lancaster county in the year 1891. This was the plaintiff's third venture in the matrimonial field. At the time of this marriage he was about 60 years old. He had one son living, the issue of the first marriage, and two daughters, the issue of the second marriage; all were of full age and married. The defendant at the time of the marriage was about 40 years of age, and was a widow with two minor children. Two children resulted from the marriage with plaintiff, one of whom died before the trial of this case and the other is still living. At the time of the marriage the plaintiff lived in Cass county and the defendant lived in Lancaster county, Nebraska, and after the marriage they took up domestic life at the husband's home. On the day before the marriage the parties entered into an antenuptial contract. It is unnecessary to set this forth *in extenso*, but, in substance, it provided that Rayles should allow the children of Mrs. Ward to live in the home to be provided by him, and that during their minority he should support, maintain, clothe and educate them in the same manner as if they were his own; that he should provide his wife with a home, provide by will or otherwise for her comfort and support after his death; that if there should be any children of the marriage, they should be equal heirs with the children now living and should not be disinherited; and it was further agreed that Mrs. Ward released all her rights, both in law and equity, to all the property that Rayles then had or might thereafter acquire if he should make the provisions for her support and that of her children as contemplated in the agreement; that he should have the right to acquire and convey real estate the same as if the contract of marriage had never been entered into between them, and that she would sign all deeds conveying real estate, and for that purpose she agreed to execute a power of attorney to him authorizing him to execute

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the same day she executed a power of attorney to carry out the provisions of the contract. They lived in Cass county a few years, and then moved to Custer county where plaintiff

defendant began a divorce action against her in the district court for Custer county. While the divorce was pending a contract was entered into between plaintiff and by the defendant's attorney. It recited that the parties had found it impracticable to live together as husband and wife, that the defendant conveyed to his wife certain horses and other personal property, and that the wife should retain her separate property, and that the wife should retain her interest in the land in Custer county, reserving the granary and barn; and the wife agreed to receive the defendant in satisfaction of all interest in the land in Custer county, and, in case there should be a judgment in favor of all claims for alimony. The contract also contained several other minor stipulations. On May 4, 1906, after certain negotiations, the divorce action then pending, this contract was signed and another contract made. This contract recited that Rayles at that time deeded to his

----- wife the 80 acres referred to in the contract of May 29. Both parties agreed to keep peace in the family, and the plaintiff agreed to cease the use of intoxicating liquors to excess. It recited that the wife owned about 30 head of cattle, but at the request of her husband she agreed to dispose of part of the same. She further agreed not to again begin divorce proceedings as long as he behaved himself, and, if compelled to begin such proceedings, then in allowing alimony the land deeded should be taken into consideration by the court. He also agreed to pay her \$50 and her attorneys' fees in the divorce suit amounting to \$100. The divorce case was then dismissed.

On October 29, the same year, Mrs. Rayles began an

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other divorce suit in Custer county. A cross-petition was filed by Rayles. Before a decree was rendered Rayles executed and delivered to the two children of their marriage, Adelia Rayles, Jr., and Jacob Rayles, Jr., conveyances to three 80-acre tracts of land in Custer county, reserving to himself a life estate therein. The court found against each of them and denied a divorce. It further found that the conveyances made constituted an equitable division of the property to Mrs. Rayles and the two children of the marriage, and ratified and approved the same. It also divided the personal property specifically in the decree, refused to charge maintenance while the parties lived apart, and adjudged that the husband pay the costs. No appeal was taken from this decree. Afterwards, the husband removed to the farm in Cass county, and in May, 1909, filed his petition in that county praying for a divorce on the ground of desertion and cruelty, and setting forth the antenuptial agreement, the contracts between the parties, the Custer county decree, and the division of the property. An answer was filed resisting the divorce, but praying for alimony if the plaintiff be given a divorce and a reply pleading *res adjudicata* and inability to pay alimony.

The defendant complains that the decree of divorce is not sustained by the evidence, and that the amount of alimony is inadequate. On the other hand, by a cross-appeal the plaintiff complains that the court erred in disregarding the antenuptial contract, the subsequent contracts made, and the final decree of the district court for Custer county, and in allowing alimony; and insists that the divorce should stand, but that the decree allowing alimony should be reversed.

We deem it unnecessary and inadvisable to set forth at length the evidence as to the unhappy conditions in this family, extending over a long period of time. It is not an infrequent occurrence that where parties in advanced life, each with a family of children of their own, contract a matrimonial alliance, they, after marriage, find that

and individual characteristics have not been fixed by the lapse of years that it is for them to yield or modify the same and happiness of the other contracting nation often requires sacrifices that had to be made. The only wonder in this case is that they were able to get along as well as they did during the period of time as they lived together. The defendant insists, that it is not fair wherein one party was more guilty than the other. Apparently both were not free from error. Considering the fact that in the eye of the law the husband was the head of the family, and that he is entitled to authority and power to fix the domicile, and that the evidence is conflicting, there is testimony that the plaintiff proposed to move from their home where their disputes and jangles had appeared, and start life anew in another place. The defendant refused to do so, and that when he was asked to follow the evidence sustains the decree of divorce.

The evidence is not so strong, but when all the facts are considered we think it sufficient.

As to the amount of alimony: The court, in determining the amount of alimony to be allowed, the value of the 80 acres of land should be taken into consideration, but

the court should also consider the value of the land and the annual income, and the extent and value of the defendant's labor in acquiring the property. The court in its decree in Custer County property rights, and that defendant is entitled to the land further. When the husband left Custer County he left 160 acres of land in that county in the hands of the children. In the 240 acres conveyed to the children, one of the children having died, the defendant each inherited one-half of the land. At plaintiff then owned 220 acres in

Custer county, with a life the other hand, the defend Custer county by conveyan acres by inheritance from this time she owns 140 acres which 60 acres is subject to also appears in the testime veyed the 80 acres in Cass c in Custer county to his chil subject to a life estate in l the trial the only farm land simple was the 60 acres wl ceased son. The deeds are tiff so testified and the fact pears also that he had been rent, and that he was pay' \$200, as well as paying for all the land except that con ing Custer county he also p of Greenwood.

As to plaintiff's contentio cree settled the property r the district court for Cass are of opinion that the dist sider the changed condition to award such further relief seemed proper. In the abs ment between the parties, that the award of alimony slight extent, but after cons case, including the several both real and personal pr satisfied that the district co tionment, and that neither cross-appeal of the husband

For these reasons, the jud

**DUFFY, APPELLEE, V. FRED SCHEERGER,
APPELLANT.**

FILED MAY 29, 1912. No. 16,745.

Issue: EVIDENCE. The defendant filed a complaint to charge a criminal offense before a justice of the peace which he requested that a warrant be issued. This was done at his direction plaintiff was arrested and held for several hours. Defendant failed to appear upon return and the plaintiff was discharged. *Held*, That the court cannot sustain a verdict on a cause of action for false imprisonment.

Actions: FALSE IMPRISONMENT: AMENDMENT OF PETITION. Plaintiff filed a petition stating a cause of action for false imprisonment. The petition was amended to state that the cause of action was filed within one year from the time the cause of action accrued, the filing, after the expiration of one year, of an amended petition amplifying the allegations is not the beginning of a new cause of action, and the cause of action is not barred.

Exception: ACTING ON ADVICE OF COUNSEL. As a general rule, one who, before instituting a criminal prosecution, obtains a fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable for malicious prosecution." *Jensen v. Halgren*, 249.

Motion for New Trial: RECORD. Affidavits purporting to be sworn to in support of a motion for a new trial, but which were not read in a bill of exceptions settled by the trial judge, are not considered.

Verdict in the district court for Madison county: REVERSED. *JUDGE. Reversed with directions.*

Costs: Allowed, for appellant.

See also Mapes & Hazen, contra.

Issue: ACTION FOR MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

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imprisonment. The first cause of action alleges that the plaintiff, on the 11th day of October, 1906, was arrested and imprisoned upon a warrant issued upon the following complaint: "The complaint of Fred Scheerger made before me, E. G. Dennis, a justice of the peace in and for Madison county, who, being sworn, deposes and says that on the 10th day of October, 1906, in the county of Madison, and state of Nebraska, D. B. Duffy, Elwood Duffy and William Duffy, did, by force, take and carry away one safe belonging to complainant, and still withholds the same. Fred Scheerger. Subscribed in my presence and sworn to before me this 10th day of October, 1906." That at the time the complaint was filed the defendant requested that a warrant for the arrest of plaintiff be issued, and that pursuant to the request the warrant was issued and delivered to a constable, who arrested the plaintiff and kept him in custody from 10 o'clock in the forenoon until 2 o'clock in the afternoon of that day; that the complaint did not charge a criminal offense, and that the arrest was made with improper motives and with the malicious purpose to coerce plaintiff into the giving of security upon an obligation in defendant's favor.

The second cause of action is for malicious prosecution on the charge of unlawfully selling and disposing of mortgaged property without the consent of the mortgagee. It is alleged that a warrant was issued on this complaint, that plaintiff was arrested and a trial had and plaintiff acquitted of the charge. Damages are laid at \$2,087.80.

The answer is a general denial, except that it is admitted that the defendant signed the complaint set forth in the first cause of action, and that such complaint does not state a public offense under the laws of the state of Nebraska. The defendant also admits signing the complaint alleged in the second cause of action, the issuance of a warrant and arrest of plaintiff thereupon, the final hearing and the acquittal and discharge of the plaintiff. As a defense, however; the answer pleads a full, fair and honest disclosure to the county attorney of all the facts

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of the defendant, and that upon his attorney the complaint was drawn by him to by the defendant, and that the defendant in all respects in the utmost good faith is a German, who cannot speak or understand the English language very well and had no knowledge of legal terms and phrases, and that he relied upon the counsel and advice of the county attorney and of one Kilbourn, a practicing attorney, to whom he fully disclosed all the facts within his knowledge, and that he took no steps to prosecute the plaintiff without such advice. The statute of limitations is also pleaded as to the first cause of action. The jury found for the plaintiff on both causes of action, and assessed his damages on the first at \$417 and on the second at \$583.

It is contended that the first cause of action did not accrue within one year after the wrong complained of and is barred by the provisions of section 13 of the code. The original petition in the case was filed in March, 1907. The wrong was committed in October, 1906. This was within the time limited by the statute. The fact that an amended petition was afterwards filed amplifying the charge did not make the filing of the amended petition the beginning of the action. It is admitted that the complaint does not charge an offense. The evidence supports a finding that the plaintiff threatened the arrest and afterwards directed the officer holding the warrant to execute it. The evidence as to this cause of action convinces us that it amply supports the verdict of the jury.

The evidence as to the second cause of action shows that Scheerger had been engaged in the agricultural implement business at Battle Creek, Nebraska; that he sold his stock and business to Duffy; that, afterwards, a car of goods came in consigned to Scheerger, which Duffy bought. He gave his note for the purchase price of these goods, and to secure this obligation executed a chattel mortgage upon the property, which consisted of manure spreaders and other implements. With the oral consent

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of defendant, the plaintiff proceeded to sell part of the mortgaged property, with the understanding between them that he should deposit in a bank for Scheerger the proceeds of the sales. Afterwards, a dispute arising between them with reference to the account, the defendant, who is a German apparently of somewhat irascible temperament, and who is unable to speak the English language with facility and is unable to understand more than ordinary colloquial speech, employed one Kilbourn, a practicing attorney in good standing at the Madison county bar, and fully disclosed to him all the facts and circumstances in the matter. Kilbourn advised him that Duffy was liable to prosecution for selling the mortgaged property without consent in writing; but, being unwilling to proceed in the matter except under the advice and direction of the county attorney, he went with Mr. Scheerger to the office of Jack Koenigstein, county attorney. At that time and place Kilbourn and Scheerger fully disclosed to the county attorney the facts as to the giving of the mortgage, and the oral consent given by Scheerger that Duffy sell the mortgaged property. The county attorney testifies that he objected at first to bringing the prosecution on the ground that oral consent given to sell mortgaged property might be held sufficient by the court; but, upon Mr. Kilbourn calling his attention to an opinion of the supreme court, he was of the opinion that the facts justified the prosecution, but he required Scheerger to give security for the costs, so as to protect the county in any event. A complaint was then drawn, either by him or Kilbourn, which was sworn to by Scheerger. The plaintiff was afterwards arrested on this complaint, a hearing had, and he was discharged.

There is evidence that before the visit was made to the county attorney Kilbourn told Duffy's attorney that there was about \$1,000 due Scheerger on the Duffy note, and that unless the note was paid he would prosecute Duffy for selling mortgaged property; that unless permission to sell the mortgaged property was in writing the defendant

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would be guilty, and unless the note was paid at once he would send Duffy to the penitentiary. Hazen further testifies that Scheerger said nothing, except that he nodded his head several times. In relation to this incident, Scheerger testifies that he took no part in the conversation and did not know what Kilbourn was about to say until after he had said it. The evidence is clear that a full and complete disclosure was made to Kilbourn, and that Scheerger relied in good faith on his advice and followed his directions. It is clear that Scheerger wanted to collect his money and that this was his purpose in consulting Kilbourn, but the moving spirit in most prosecutions for the unlawful selling of mortgaged property is the failure to receive the proceeds of the sale and the resentment occasioned by such failure. Scheerger was evidently out of patience, but it is equally evident that he took no steps until advised to do so, and that he relied upon his lawyer for advice and directions in the whole matter. The sinister presumption as to want of probable cause and malice where the prosecution is brought only to collect a debt cannot we think be applied under all the testimony. In this connection the facts as to Scheerger's nationality and ignorance of the English language become material.

Under the facts in the record, the familiar principle must be applied that "one who, before instituting a criminal prosecution, makes a full, fair and honest statement to an attorney of all the facts within his knowledge, or which he could have ascertained by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon his advice, will not be liable in an action for malicious prosecution." *Jensen v. Halstead*, 61 Neb. 249; *Biddle v. Jenkins*, 61 Neb. 400; *Gillispie v. Stafford*, 4 Neb. (Unof.) 873; *Van Meter v. Bass*, 40 Colo. 78, 18 L. R. A. n. s. 49, and note. We are convinced that the evidence clearly sustains the defense pleaded, and that the verdict and judgment on the second cause of action are erroneous and must be set aside.

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Complaint is made that the verdict upon each cause of action was arrived at by chance, and what purports to be copies of certain affidavits of jurors are found in the transcript. The affidavits, not being in the bill of exceptions settled by the trial judge, cannot be considered. *Gray v. Godfrey*, 43 Neb. 672.

We find it unnecessary to examine the other errors assigned.

The judgment of the district court is therefore reversed and the cause remanded, with directions to the district court to render judgment upon the verdict of the jury upon the first cause of action, with interest from the date of its return, and costs, and to dismiss the second cause of action; each party to pay his own costs in this court.

REVERSED.

IRVIN I. SHULL, APPELLEE, v. JOHN GOERL, APPELLANT.

FILED MAY 29, 1912. No. 17,073.

Specific Performance: SALE OF LAND. Plaintiff and defendant entered into a written contract for the sale of 160 acres of land for \$15,600. Five hundred dollars was paid in cash, \$2,000 was to be paid January 1, 1910, and a mortgage given for the balance. The vendor was to furnish a warranty deed and a good and sufficient abstract of title. Time was an essential element in the contract. A few days before January 1, 1910, the vendor consented to a delay until January 5 on account of inclement weather and bad roads whereby the vendee was prevented from reaching the office of the middleman where they had agreed to meet. On that day, the same conditions prevailing, the vendee was unable to attend the meeting place, though he had paid \$1,000 to the agent for the defendant, and the vendor, without having prepared for delivery or having tendered a deed or abstract, declared the contract canceled. On January 11 the vendee was ready to perform, and the vendor was notified that the \$2,000 had been paid and the mortgage and note executed, but he refused to execute the contract. *Held*, That the vendor having retained the money paid, having waived strict performance on the day named, and having failed to tender an abstract and deed as specified by con-

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tract, the equities of the vendee are superior to his, and that the decree of the district court awarding specific performance is justified by the evidence.

APPEAL from the district court for Merrick county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

Elmer E. Ross and Baldrige, De Bord & Fradenburg,
for appellant.

Martin & Bookes, contra.

LETTON, J.

This is an action for specific performance of a contract for the sale of real estate. A decree was rendered in favor of the plaintiff, from which the defendant appeals.

On July 31, 1909, the parties entered into an agreement whereby the defendant Goerl agreed to sell to plaintiff 160 acres of land for \$15,600, payable as follows: \$500 cash, which was evidenced by a note then executed and later paid; \$2,000 cash due January 1, 1910; and a mortgage for \$13,100 at 5 per cent. to be dated January 1, 1910. Time was made the essence of the contract.

The testimony shows that plaintiff was a tenant of one W. C. Kerr, who was engaged in the real estate business in Central City. Goerl, the vendor, had listed the land with Kerr for sale. Kerr showed the land to plaintiff and negotiated the sale. He drew up the contract of sale in duplicate, and became security for the plaintiff upon a note for \$500 to cover the first payment. This note was afterwards paid to Goerl. Upon December 28, 1910, plaintiff delivered to Kerr a check for \$1,000 payable to him for the purpose of paying on the contract on January 1, 1910, when the \$2,000 came due, and on January 11 he paid Kerr another \$1,000 for the same purpose. In the latter part of December, 1909, Kerr went to Goerl's residence; Goerl was not at home, but his son Fritz, who often acted for him, was there. He told Fritz to tell his father that Mr. Shull and wife would be at his office on

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January 5 to execute the notes and mortgage, that the money would be ready, and for his father to come in ready to complete the contract. So far there is no dispute in the testimony.

As to what occurred on the 5th day of January at Kerr's office there is a sharp conflict. Kerr testified that Goerl called at his office on that day; that he told Mr. Goerl that he had \$1,000 there to pay him, asked him about the deed and abstract, and told him that Mr. Shull wanted an abstract; that Goerl got angry and went out, and that he never received from Goerl or tendered to Shull either an abstract or deed; that at a later date Goerl told him that he had canceled the contract; that at this later conversation he told Goerl he had \$2,000 of Shull's money in his hands, and that Shull wanted his papers; that on January 11 he notified Goerl by letter that he had received this \$2,000 from Shull for payment on the contract. The witness testified that he still has the \$2,000 in question in his possession.

On the other hand, Goerl testifies that he was at Kerr's office on January 5, 1910; asked if the money was there; that Kerr said that the money was not there, that the weather was bad and Shull could not get out his corn; that he (Goerl) said, "That is a poor excuse, he had five months' time to finish that, and I have to keep to the contract, that is all I can do;" that Kerr never mentioned having \$1,000 there for him, never said anything about money, and did not offer any mortgage or notes; that he took with him his old abstract, deed, mortgages, patents, etc.; that Kerr did not ask him about an abstract; that he did not show Kerr the papers, and that he never received a letter from Kerr. Goerl's son-in-law, William Sandeman, testified that he went with him to Kerr's office on January 5 and heard all the conversation. He corroborates Mr. Goerl's version, and testified that nothing was said by Kerr about having any money on hand, or with reference to a deed or abstract; that Kerr became angry when Mr. Goerl told him he was going to cancel

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ct, and so they left without further conversation. Goerl testified that, in August, Shull told him an account of the way the crops looked he could take the place, and that he did not want them to hold all any of their stock until he knew whether he was to take the place or not. Mr. Shull testified that he was not his agent in any of these transactions; that he gave him a check of \$1,000 for Mr. Goerl on December 1909; that he had plenty of corn and live stock for sale with which to raise the money; that he made payments at a bank for the balance if he could not sell the stock and grain; that he lived 16 miles from Central City, and that on the 5th of January the weather was so bad that his wife and himself could not go out. That Goerl never furnished him an abstract of title, never tendered him a deed; that in August he offered to get his \$500 note returned and cancelled, but that Goerl refused to give it up, and that he told Goerl that if he had to lose the \$500 he might as well go ahead with the deal; that on January 11, 1910,

Goerl came to Central City and left \$1,000 more with Kerr, and he signed and delivered to Kerr the note and mortgage under the contract, and that up to that time the balance of \$2,000 had never been demanded and he had never heard any word from Goerl that he would cancel the note; that Goerl still retains the \$500. Fritz Schuller testified that he had a talk with Kerr about December 31, 1909, at the home place, and also a telephone conversation about the first Tuesday in January, 1910. In the first conversation Kerr said that on account of the bad roads and snow Shull was having difficulty in getting his crop to market, and the weather was so bad that he was unable to get to town and this was causing Mr. Schuller delay; for them not to come in before Wednesday. That he telephoned not to come in before Saturday. That the witness told Kerr that would be all right, that he would tell his father as soon as he got home; that when his father got home he told him Kerr had been out

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and said not to come in until Wednesday, and then he telephoned on Tuesday that Shull could not come in until Saturday, and the father said it was all right if they would come up to the contract.

It appears that Goerl had an old abstract of title coming down to about 15 years before, but that he never had prepared and tendered to plaintiff for examination an abstract of title to the property or a deed to the same. There is no provision in the contract providing for the forfeiture of the money paid, yet he still retains the \$500 paid upon the contract. It appears from the undisputed testimony that Goerl consented to a short delay to allow Shull to dispose of his grain and to come to Central City. Having thus waived a strict compliance with the terms of the contract as to time, when the money was ready for him upon the 11th of January, and when he was actually prepared to perform its conditions on his part, we think it would be highly inequitable to allow him to retain the \$500 paid and to insist upon the cancelation of the contract. We think the equities of the case are with the plaintiff.

The judgment of the district court is therefore

AFFIRMED.

CHARLES LAMBERT V. STATE OF NEBRASKA.

FILED MAY 29, 1912. No. 17,443.

1. **Criminal Law: NEW TRIAL: MISCONDUCT OF JUROR.** Under the evidence in this case, an improper statement made by a juror in the jury room, after the case was submitted, *held* not to constitute such prejudicial error as to require the reversal of the judgment and the granting of a new trial.
2. ———: ———: **CONFINEMENT OF JURY.** The case was submitted to the jury upon Wednesday at about 11 o'clock P. M. The verdict was rendered upon the succeeding Friday morning. During the two nights that intervened the jury were not furnished sleeping

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accommodations, but were kept in a comfortable and received regular meals. The practice of keeping jurors periods without opportunity to sleep is unfavorable, but, under the facts set forth in the opinion, held, the district court did not err in refusing to grant a new account.

3. —: EVIDENCE. A farmer, who was the owner of a harness which plaintiff in error was charged with receiving, was permitted to testify as to the purchase of the harness in the regular course of trade a short time before the theft, and as to the amount of wear that it had, and also to give his opinion as to the value of the harness.

ERROR to the district court for Thurston county.
T. GRAVES, JUDGE. *Affirmed.*

Thomas L. Sloan and Herman Freese, for plaintiff in error.

Grant G. Martin, Attorney General, Frankton and Howard Sarton, contra.

LEITON, J.

Plaintiff in error was convicted on the charge of receiving stolen property of the value of \$36. The error assigned and argued in his behalf is that of the misconduct of the jury. Affidavits of three jurors were filed in support of the motion for new trial and in substance to the effect that a juror named Hill, after the verdict was submitted and during its consideration by the jury, stated that he knew Lambert to be a thief and that he repeated this as a statement during the whole time the case was under consideration. On the other hand, an affidavit was filed by Hill denying that he ever made a positive assertion that Lambert was a thief, but the affidavit recites that he had no acquaintance with Lambert, an incident which happened during the trial recalled to his memory that he had heard it stated by a brother-in-law

accused at a time seven years before the trial that he had heard a rumor that Lambert was a thief. Hill's affidavit further averred that when he made this statement he was reprimanded by another juror for making the same and that he did not repeat it. The affidavits of other jurors are to the effect that the remark made by Hill, which was heard by all of them, made no impression upon their minds and that the verdict was based upon the evidence submitted. Plaintiff in error does not contend that the affidavits of the jurors produced by him may be used to impeach the verdict, but says that he complains only of the misconduct of the juror Hill. The trial court determined that the statement made by Hill was not prejudicial to the accused. We are of the same opinion. The statement was improper and should not have been made, but, under the evidence, we are unable to perceive whereby this misconduct could or did affect the verdict.

It is next contended that a new trial should be granted for the reason that the verdict was forced by the physical exhaustion of certain jurors. It appears from an affidavit made by certain jurors that the case was submitted to the jury on Wednesday at about 11 o'clock P. M., that the jury were confined from that time until the succeeding Friday morning when the verdict was rendered, that during the two nights there were not furnished sleeping accommodations, that they deliberated during the two nights and a day in which they were kept together, and that they were physically exhausted to such an extent they could not hold out longer, and they agreed to the verdict for that reason and by reason of being harassed by other jurors who had determined not to yield. Counter affidavits of most of the other members of the jury were filed by the state to the effect that the jury were placed in a comfortable room with chairs, table and paper, that they received their meals and had plenty to eat and drink, and that no juror was physically overcome. If the evidence in this case left the matter of the guilt of the defendant a close question, we should be very much inclined to set

aside the verdict and grant a new trial on account of this treatment of the jury. It is high time that the barbarities of the common law should be done away with, and that verdicts should be reached as a result of thought and deliberation, and not as a result of physical compulsion. There is no more reason for subjecting jurors to confinement in a small room for two nights and a day without opportunity for rest or repose than there would be for subjecting the judge himself or the other officers of the court to like privations. The strength of memory and the capacity for sound judgment usually found in persons in elderly life, as a number of these jurors were, is apt to be impaired if they are deprived of sleep for 48 hours. Moreover, under such conditions the man who is physically stronger may by force of that very fact prevail over the judgment of his brother juror who may be stronger mentally, but physically weaker. We criticise the practice unfavorably in the hope that it may not be repeated, but in this case we are of opinion that the evidence sustains the finding that the verdict was not produced as a result of the exhaustion of the jurors who made the affidavit.

There is another consideration entering into this case which should, perhaps, be noticed. The evidence of the value of the property alleged to have been received took a wide range, extending from \$10 or \$15 to \$45. The jury found the value to be \$36. By an oversight of the legislature, possibly, the receiving of stolen property of any less value than \$35 is not a crime. The court was, therefore, compelled to instruct the jury that, in order to find the defendant guilty at all, they would have to find the value of the property to be at least \$35. It was then for the jury to find that value or acquit. They went one dollar over the mark fixed by law. It is complained that there was no competent testimony as to the value of the harness. It is shown that it was nearly new and had only been used a few times, that the owner of the harness, whose testimony is particularly complained of, paid

\$52 for it, and that a small part of it was missing. The principal objection urged is as to the competency of the testimony of the owner as to the price he paid and the amount of wear of the harness, and to his opinion of the value based thereon. We think that the amount that the harness cost when purchased in the regular course of trade a short time previous to the theft and the amount of wear that it had received were proper elements to be considered by the jury in fixing the value. It is shown that the opinion of the witness was based upon these elements. Having before it the facts upon which the witnesses' estimate of value was based, we cannot see wherein the accused was prejudiced in this regard. A number of other witnesses were examined upon both sides of this question, and we think there is no prejudicial error in this regard.

Complaint is also made as to the giving of certain instructions. The imperfections in these instructions have been repeatedly pointed out by this court and they should not have been given, but under the condition of the record we cannot perceive wherein the defendant was prejudiced by their having been given.

A number of other errors assigned have been considered and disposed of by this court in the case of *Lukehart v. State*, ante, p. 219, a companion case to the facts in this case, and will not be again reviewed.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., dissenting.

It is said in the majority opinion: "Complaint is also made as to the giving of certain instructions. The imperfections in these instructions have been repeatedly pointed out by this court and they should not have been given, but under the condition of the record we cannot perceive wherein the defendant was prejudiced by their having been given." The instructions complained of are as follows:

The rule which clothes every one accused of the presumption of innocence, and imposes the burden of establishing his guilt beyond a doubt, is not intended to aid any one who is trying to escape, but is a humane provision of the law, so far as human agencies can, to guard against the danger of any innocent person being unjustly convicted. A doubt, to justify an acquittal, must be real. It must arise from a candid and impartial consideration of all the evidence in the case; and unless it is a real doubt, were the same kind of a doubt interposed in the transactions of life, it would cause a reasonable man to pause, it is (in)sufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the charge, you are satisfied beyond a reasonable doubt.

The court instructs the jury, as a matter of law, that the doubt which a juror is allowed to retain in reaching his verdict, and under which he should frame his verdict, must always be a reasonable one. A doubt which is the result of undue sensibility in the mind of a juror, in consequence of his verdict, is not a reasonable doubt. A juror is not allowed to create sources of doubt by resorting to trivial and fanciful suppositions, or conjectures, as to a possible state of facts not established by the evidence. You are not to disbelieve as jurors if from the evidence you are satisfied as men. Your oath imposes upon you no obligation where no doubt would exist if no such oath were administered. You are instructed that if, after a full, impartial consideration of all the evidence, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of a moral certainty of the truth of the charge against him, then you are satisfied beyond a reasonable doubt.

It is further instructed that the above instructions have been con-

demned by this court, but this condemnation has been very tardy in coming, and it does not seem to the writer to be in active operation yet. As late as *Leisenberg v. State*, 60 Neb. 628, delivered at the September term, 1900, this court said of two of the most objectionable sentences in the instructions referred to: "This instruction has never, to our knowledge, received judicial condemnation; on the contrary, it was considered and distinctly approved in *Willis v. State*, 43 Neb. 102, and *Barney v. State*, 49 Neb. 515." The objectionable sentences are: "You are not at liberty to disbelieve as jurors if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."

In *Willis v. State*, *supra*, Judge RAGAN, Commissioner, delivered the opinion of the court. A comparison of paragraphs 15 and 16 of the instructions in the instant case shows that the language used is almost identical with the language used in the instructions of the court in the very noted case of *Spies v. People*, 122 Ill. 1. This is what is known as the anarchist case. It covers pages 1 to 267, inclusive. On page 82 of the report are the two original instructions from which the above instructions in this case are taken. For the convenience of the reader we reproduce them here:

"12. The court instructs the jury, as a matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

court further instructs the jury, as a matter of doubt which the juror is allowed to retain in mind, and under the influence of which he returns a verdict of not guilty, must always be a reasonable doubt. A doubt produced by undue sensibility of any juror, in view of the consequences of a verdict, is not a reasonable doubt, and a juror is not to create sources or materials of doubt by resort to conjecture and fanciful suppositions and remote conceivable possible states of fact differing from that shown by the evidence. You are not at liberty to instruct the jurors, if, from the evidence, you believe as the oath imposes on you no obligation to doubt, that a doubt would exist if no oath had been admin-

v. State, 49 Neb. 515, this court follows the instructions above given in the *Spies* case. The instruction delivered by Commissioner IRVINE, and is a comparison of the instruction used in that case with the instruction used in the *Spies* case will show that the language used is almost identical, except that in the *Spies* case there were two instructions and in *Barney* there was only one. Judge IRVINE makes an elaborate argument justifying the use of the instruction.

The object to it is that, while this court has finally affirmed the instruction to that point where it condemns the instruction, it has not condemned it in any practical way so as to prevent any good. What difference does it make if the reviewing court says it condemns the instruction as improper, but refuses to reverse the verdict of the prisoner in the penitentiary? I am not a practical condemnation of the instruction. I will reverse a case and give the defendant a new trial if it has been prejudiced by the giving of the instruction. If this court says the instruction is wrong and should not be given; then, in effect, it says, we cannot reverse simply because the trial judge has given

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improper instructions to the jury which probably convicted him. It is true that this court has announced the fact that an instruction of that kind is wrong, and some time or other, no one may tell when, it is likely to announce that the case is reversed because this instruction has been used. This instruction is either right or wrong. This court has no right to say that we reserve to ourselves the right to say *when* we will reverse a case because this instruction is objectionable. This sort of treatment of the rights of men who are charged with a crime, and their counsel, leaves everybody in the dark. The exercise or nonexercise of the power to reverse the case becomes arbitrary and despotic, and leaves to the will of the judges who sit as the reviewing court to say that in one case the judgment ought to be set aside, and in another case that it ought to stand, although the language in the instruction is just the same. The truth about the matter is that, whenever a trial judge wants to convict, he will use this condemned instruction, with a feeling that, no difference if he has done so and the man has been wrongfully convicted under an instruction which this court has condemned, yet, nevertheless, this court will never reverse the case. If the instruction used in A's case is condemned and A is left in the penitentiary, and in B's case nothing is said about the instruction and B is left in the penitentiary, what is the difference between A and B so far as any good either has received from this court?

In the hope that this court will exercise the power which is given to it and will proceed to lay down some sort of a rule for the guidance and control of the district judges, I want to briefly discuss the instructions used. I want to say of the instruction in the *Spies* case that we are beginning to be far enough away from that case to exercise a little of that calm and dispassionate judgment which history will ultimately record. That case originated in Chicago where the people believed that their lives and property were in danger from an organization known as the anarchists. The men arrested and tried were tried

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ie of them were defended by
ny more than they defended
instruction would probably
because of the peculiar cir-

cumstances. There was a fight between the anarchists in Chicago on the one side and the people on the other side. An instruction that an oath of a juror imposes upon him no obligation to doubt where no doubt would exist if no oath had been administered belittles the effect of taking the oath and is an attempt to do away with its influence. *State v. Ruby*, 61 Ia. 86; *Siberry v. State*, 133 Ind. 677. The effect of the instruction is to say to the jurymen: "If you have any doubts you do not need to let them trouble you." The language used is an invitation to disregard the evidence. It tells the jurymen that he may give expression to his belief as he might have it as a man and without acting as a juror; in other words, that he can express his belief about the matter just as he might express his belief about any bit of neighborhood gossip that he might hear. That part of the instruction in the instant case which tells the jurymen that the instruction "is not intended to aid any one who is in fact guilty to escape," and also says, "a doubt, to justify an acquittal, must be reasonable," assumes that the juror is looking for something that is not in the case. It assumes that he is looking for a state of facts differing from those established by the evidence. The juror is a sworn officer of the law. He is selected generally because he is a well-known and prominent citizen whose business ability and superior intelligence commend him to the position which he is selected to fill. That an American judge should assume in a trial that the juror selected by a system provided by law would seek to shirk his duties, and that he would refuse to discharge them, and that he would need to be reminded of his inferiority and his tendency to go wrong is surpassingly strange. It is un-American and undemocratic. Such a course is deserving of unmeasured censure and condemnation and a

reversal. No juror should be urged "to justify an acquittal." That sort of a thing is scolding him in advance. Perhaps the members of this court have reasoned the matter out and know better than I do that it is all wrong, because they have condemned it, but their condemnation is utterly futile and brings nothing. This court ought to reverse this case, and until it does reverse a case where this instruction is used, and for that reason alone, there will be no attention paid to it by the trial judges who seek conviction and who are willing to ignore this court. It is no part of the duty of the judges to determine the guilt of the accused in the first place. The judges of the trial court are charged with the duty of giving proper instructions to the jury so that the jury may intelligently determine the questions of fact involved. It would seem that this court assumes to itself the right to determine *when* the anarchist instruction may be given without injury. This cannot be. There is always injury whenever the court talks to the jury about giving a reason for justifying an acquittal, or whenever the court talks to the jury about the doctrine of reasonable doubt being applicable to one case, the case of the innocent man, and not applicable elsewhere. Unfortunately this court in its treatment of the cases seems to assume the right to be as arbitrary as these district judges who refuse to be bound by the instructions which this court gives them from the bench. I do not clearly see the difference if the result is that the trial judge by giving this vicious anarchist instruction puts the defendant in the penitentiary and this court leaves him there, although it *says* the instruction is wrong.

In the case of *Bartels v. State*, p. 575, *post*, this court has decided the principal part of the first instruction given in this case to be prejudicially erroneous. The syllabus is: "An instruction in a criminal prosecution that the rule that requires proof of guilt beyond a reasonable doubt 'is not intended to aid any one who is in fact guilty to escape,' and which intimates that an acquittal

not guilty must be condition of this record, ceous." The point in holds that the doctrine ily for innocent per- y one that is in fact language. It is also of the language "that . verdict of not guilty hat is wrong with the ourt to say when and prejudicial, and when

This court says we want to, and we will ill give no reason to ave to. This is seem-

the language used in struction is held to be is reversed, but there the opinion the reser- court to apply the we like and we won't v. *State*, 86 Neb. 189,

language used in the n the instant case as for justifying an ac- not guilty, and it held rsed the case, citing he language used in delivered the opinion last cited.

his court condemned t. The two instruc- ph of the second one st identical with the instruction in the struction in the *Flege*

case is very like the fifteenth instruction in this case. The writer of the opinion in the *Flege* case, Judge SEDGWICK, emphasizes the condemnation of the twenty-fourth instruction in that case by saying: "A jury in such a case ought not to be told that they must 'justify an acquittal' or that they must find something in the case 'to authorize a verdict of not guilty.'" While Judge SEDGWICK finds the language used in that instruction "so prejudicial as to require a reversal," he says: "The majority of this court, however, considers that instruction No. 24 is not prejudicially erroneous in this case." Here is again the reiteration of this court that it refuses to declare any tangible rule for its own government. The rule is no rule because it is as uncertain and as unfindable as a jack-o'-lantern in a swamp, and still this court has made progress since the opinions first above cited were written.

STEPHEN I. BROWN, APPELLEE, v. SWIFT & COMPANY,
APPELLANT.

FILED MAY 29, 1912. No. 16,669.

1. **Master and Servant: INJURY TO SERVANT: LIABILITY.** In a suit by a servant against the master for personal injuries, the employer is liable for the consequences, not of danger, but of negligence.
2. ———: ———: **DUTY OF SERVANT.** A servant of mature years and of ordinary intelligence should, in performing the duties of his employment, take notice of the ordinary operation of familiar laws of gravitation and govern himself accordingly.
3. ———: ———: **APPLIANCES.** The general rules of law applicable to the furnishing of tools and appliances by a master are not always applied, where a simple implement is furnished by him to a servant of mature years and of ordinary intelligence.
4. ———: ———: ———: **DUTY OF MASTER.** Where a servant of ordinary intelligence and of mature years has operated a simple implement often enough to enable him to avoid being injured by it, when using it in the exercise of ordinary care, or where the mode of operating it is so simple that such a servant can at once

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perceive the safe and proper way to do so, if exercise of care, there is no duty resting upon the master to that regard.

5. ———: ———: TRIAL: DIRECTING VERDICT. In an action by a servant against his employer for personal injuries resulted from defendant's negligence, it is error to submit the case to the jury, where defendant is entitled to an empty instruction on the undisputed facts.

APPEAL from the district court for Douglas County.
WILLIS G. SEARS, JUDGE. *Reversed with directions.*

Greene & Breckenridge, for appellant.

McCoy & Olmsted, contra.

ROSE, J.

Plaintiff was injured when he was attempting to move a truckload of meat from a freight car to the cellar of defendant's packing-house at South Omaha. An action for personal injuries thus sustained resulted in a judgment for \$2,725, and defendant appealed. Plaintiff died after the case was argued, and it has been revived in the name of the executor of his estate.

Plaintiff entered defendant's employ September 1, 1904, and the injury occurred December 1, 1904. He worked in the smoked-meat department until November 1st, and thereafter handled a truck in the pickle department. He was 48 years old, 5 feet 10 inches high, weighed 170 pounds, was in perfect health, and a man of at least ordinary intelligence. In moving meat from the packing-house, he was working on a second platform, a structure the length of freight cars. It is adjacent to the second railroad track, which extends north and south. A runway from the cellar to this switch opens to the north and south at the west side of the platform near the freight cars, being equally convenient from both ends. C

the accident, until about 4 o'clock in the afternoon, plaintiff had been hauling meat on a truck from the sweet-pickle cellar up the runway into a car at the south end of the platform. A few minutes before the hour named he had been directed by the foreman in charge to take a truck-load of meat out of a car at the north end of the platform to the sweet-pickle cellar. This order required plaintiff to leave the south end of the platform, where it is 9 feet wide and 2 inches lower than the floor of a freight car, and go to a freight car on the north end of the switch, where the platform is less than 7 feet wide, and, owing to a difference in elevations of the railroad track, 10 or 12 inches lower than the floor of a freight car. The car to which he was directed to go was 8 inches from the platform, and in unloading it the trucks were run in and out on a wooden apron $3\frac{1}{2}$ feet long, one end resting on the floor of the car and the other on the platform. Plaintiff was using an ordinary two-wheeled truck with a box resting on the axle and on shafts supported in front by legs available for brakes, the center of mass being in front of the axle when the box is level. The handles were on the front ends of the shafts. Plaintiff took the truck thus described into the car at the north end of the platform, and after it had been loaded he started to the sweet-pickle cellar. He stood between the shafts with his back to the load, and pulled the wheels onto the apron, intending to turn to the right toward the runway as soon as they reached the floor of the platform. Instead of lowering the handles and sliding the shaft-legs on the platform to retard the motion when the truck began to run down the incline on the apron, he pulled back on the handles, with the effect of raising them without stopping the truck. He failed to make the turn quick enough, and the truck ran across the platform against upright timbers which supported a plank foot-walk along an elevated switch-track 4 feet higher than the platform on which he was working. His left hand was crushed by the impact and pinned to a timber. East of the foot-walk and the elevated switch-

as also an elevated platform accessible from or of the packing-house, and all were above through which plaintiff had been passing the day he was injured. The walk, the platforms were all parts of permanent structure erected by defendant in connection with its business.

The legal inquiry is: Was it the duty of defendant to warn plaintiff of the dangers incident to running the truck from the apron to the platform and to instruct him in the manner of that part of his work? Plaintiff asserts that he had never before hauled a car at the north end of the platform, that he was ignorant of the dangers incident thereto, and that, under the circumstances and surroundings, he did not know how to operate the truck so as to prevent injury to himself.

In his recovery defendant invokes the following rule: In an action brought by a servant against the master for personal injury, if the injury is caused by the negligence of the master, the employer is liable for the consequences, but not if it is caused by the negligence of the servant. *O'Neill v. Chicago, R. & N. W. Ry. Co.*, 66 Neb. 638; *Central Granaries Co. v. Ault*, 66 Neb. 638; *Weed v. Chicago, St. P., M. & O. R. Co.*, 56 Neb. 623.

A servant of mature years and of ordinary intelligence should, in performing the duties of his employment, take notice of the ordinary operation of the machinery and of the laws of gravitation and govern himself accordingly. *St. Paul & D. R. Co.*, 27 Minn. 367; *Parsond Packing Co.*, 96 Mo. App. 372. The rule of law applicable to the furnishing of tools and machinery by a master are not always applied, where the servant is furnished by him to a servant of ordinary intelligence and of ordinary intelligence. *Vanderpool v. St. Paul & D. R. Co.*, 79 Neb. 165. Where a servant of ordinary intelligence and of mature years has operated a simple machine long enough to enable him to avoid being injured when using it in the exercise of ordinary care, the mode of operating it is so simple that such a servant should at once perceive the safe and proper way

to do so, if exercising ordinary care, there is no duty resting upon the master to instruct him in that regard. *Jones v. Louisville & N. R. Co.*, 95 Ky. 576.

Are these rules of law applicable to the facts stated? The case might be different, had the load behind the servant's back slipped in the box, through a defect of which he had no knowledge, tipped the handles and inflicted personal injuries. *Parsons v. Hammond Packing Co.*, 96 Mo. App. 372. There was no defect in the truck, either latent or patent. The platform where plaintiff was working was part of permanent structures, which had been used for a considerable time without change. There was no hidden danger or defect anywhere. The whole situation was obvious. The conditions could have been seen by plaintiff every time he went into or came out of the car at the south end of the platform. He wheeled the truck into the north car at the identical place where he came out of it. The apron had not been moved. He had been using the same truck all day under conditions differing only in the slant of the wooden apron leading to the car, in weight, and in the width of the platform. He knew as well as his master that the loaded truck, if unobstructed, would run down the apron when started, and that the handles would tip as soon as raised high enough to throw the center of mass behind the axle. This knowledge did not require observation beyond a child's experience with a cart and a seesaw. Plaintiff had hauled the truck up and down an incline all day, and, if he exercised ordinary care, he knew that the shaft-legs, when lowered to the ground, would act as brakes. The evidence shows that he knew the weight of his load. In that respect his master could have known no more. Both the tipping of the handles and the velocity of the truck were due to familiar laws of gravitation as well known to the servant as to the master. The implement used was a simple one in common use. The mode of handling it is immediately observable to a person of ordinary intelligence and of mature age. It was intended for a single employee. There

record to show that more help was needed that plaintiff was not strong enough for at he did not have a safe place to work. y circumstances under which the master with the duty of giving the servant notice accident to his employment, or of instruction to use the implement provided for him. ent and consequent misfortune appeal to ies, there is no principle of law, applicable ler which a jury can be permitted to find nce of defendant was the proximate cause juries. At the close of the testimony ded a peremptory instruction in its favor, ave been given. It was erroneously re- ion, the rules herein stated were violated ing evidence and in charging the jury. ie trial court, instead of making a concise e simple issues to the jury, submitted four e type-written allegations copied from the all of which were immaterial, and directed e burden was on plaintiff to establish every tion of the petition, but did not advise material allegations were. On such a dict would have to be set aside, even if a recovery under the facts.

t is therefore reversed and the cause re- lirections to the district court to dismiss

REVERSED.

not sitting.

lissenting.

ent, when all the facts in this case are con- asily distinguishable from the cases cited from the negligent use of a simple tool

Plaintiff, who had never used the two- in unloading a car, was sent to work in a e narrowness of the platform, the weight

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of the meat loaded onto the truck, the difference in elevation of the car floor and the platform, the obstruction caused by the edge of the apron at the car door, and the nearness of the overhanging trestle created a condition of peculiar danger not obvious to an ordinary man who had not been instructed as to the necessity of using the friction of the legs of the truck upon the floor of the apron as a brake in order to prevent the impetus of the heavily loaded truck from forcing him against the trestle. The trucks weighed about 400 pounds, and the loads from 600 to 800 pounds. The testimony is clear as to the danger of taking a heavily loaded truck out of a car at that end of the platform in the ordinary manner and without bearing down or riding on the handles so as to use the legs as a brake; and it is undisputed that the only safe way to unload with the truck under the conditions was to put the handles down as soon as the wheels were over the edge of the apron so as to keep the weight from overcoming the man's resistance and pushing him against the trestle in front before he could turn the truck. In view of the surroundings, there was danger in doing this work unless it was done in a particular manner. This being the case, it was the duty of the employer to point out the danger of performing it in any other way, and to fail to so instruct was actionable negligence.

.CLYDE E. CARLOS, APPELLEE, v. HASTINGS INDEPENDENT
TELEPHONE COMPANY, APPELLANT.

FILED MAY 29, 1912. No. 16,685.

Master and Servant: ACTION FOR SERVICES: SUFFICIENCY OF EVIDENCE.

On a record showing that the manager of a telephone company had received for his services \$75 a month for eight months, the evidence discussed in the opinion is *held* insufficient to sustain a finding of the jury that the telephone company had agreed to

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0 a month for the same period, the action being one
he balance due on a contract of employment.

m the district court for Adams county:
RCORAN, JUDGE. *Reversed.*

and *Tibbets, Morey & Fuller*, for appellant.

evens and J. A. Gardiner, contra.

s the manager of the Hastings Independent
npany, defendant, from January, 1906, to
07, and this is an action to recover an un-
of \$200 on his salary under his contract of

The amount of the monthly salary which
eed to pay him for his services for the eight
April to November, inclusive, was the con-
e. What defendant in fact paid him was

For that period he recovered in this action
o a jury a judgment for \$25 a month more
or \$241.45 in all. Defendant has appealed.

in which the record is presented for review,
must stand or fall upon the sufficiency of
o sustain the verdict. Plaintiff did not sue
in meruit, but upon a contract. In his peti-
d that he was employed as manager Decem-
that his services were to begin January 1,
t defendant agreed to pay him \$75 a month
two or three months, and, if the said de-
ned the plaintiff longer than two or three
y him \$100 for the balance of the time said
employed by defendant." He further alleged

im from defendant "on said contract of em-
services rendered by the plaintiff to the de-

April 1, 1906, to December 1, 1906, a bal-
m of \$200." Both parties agree that plain-
for the months of January, February and
ed by the contract at \$75 a month and paid.
ths of December and January plaintiff re-

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ceived \$85 a month, and this compensation is not in dispute. Defendant denied that it agreed to pay plaintiff \$100 a month for the months from April to November, inclusive, but alleged his salary was \$75 a month for that period. The minutes of the corporation recite that \$75 a month was the salary fixed by defendant, and its vouchers show that plaintiff received that sum each month during the eight months in question and receipted in full therefor. The payment and the receipt of \$75 a month are also shown by the ledger kept by defendant when plaintiff was its manager.

In view of these facts, it was incumbent on plaintiff, since he sued upon a contract of employment fixing his salary, to prove that defendant agreed to pay him for his services \$100 a month from April to November inclusive. Was the contract proved? His oral testimony shows that he had previously occupied a similar position at Broken Bow. While thus employed, early in December, 1905, he attended at Hastings a meeting of defendant's directors—a board composed of five members. On the witness-stand he said he told the board at that meeting his salary at the time was \$100 a month. When asked if he was getting that, he answered: "I was; yes, sir. One of the board then asked me what my object was in coming down here for \$75—asked what was my object in leaving there at \$100, when I was only to get \$75 here. I said that this was a larger town and a larger company, with larger opportunities for me, and they finally said: 'You come as an entire stranger. All that we know is what you tell us of your experience, and you should be willing to work for a month or two for \$75 per month,' until, as they expressed it, they could 'try me out;' and I told them I would under those circumstances, but that I would not consider that permanently, and that, I think, was the sum and substance of the whole conversation. They told me that they would take the matter under consideration and notify me, and I took that as indicative that they were through with me that night."

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r the board meeting, defendant's manager wrote ff a letter, dated December 13, 1905. Plaintiff testified it had been destroyed and was permitted to introduce the following as a copy: "Replying to your letter of yesterday, will say that our board met this morning and decided to employ you under the conditions talked over when you were here, viz., \$100 per month, if they choose to retain you; and that Mr. Carlos be notified that consideration of further advancement in salary would be dependent on the value of his services, and that it will be the purpose of the board to pay a salary which is commensurate with the value of the services rendered, and the same shall come January 1, 1906.' Please write me at once how soon you can be here, as I am anxious to be notified, and am going to try and get out before the 20th of the month. I guess there will be some one who can look after things for a few days between our regimes."

Referring to his first meeting with the members of the board, plaintiff testified he told them what he was getting, and that he had said: "I wouldn't take less, except that I would take less for a month or so, until they found I was the man they wanted;" and, further: "I don't know as I would have any objection to working a month or so with you for that figure"—\$75 a month. He testified that no particular time was fixed to begin the payment of \$100 a month; that, though it was his duty to bring matters of business before the board, he never presented the question as to when full compensation should begin; that in April or May he spoke to two of the five directors about bringing the matter before the board, and that they said they would bring it up; that he "made no statement to the board at the end of three months as to why his salary should not be \$100 a month."

Plaintiff is bound by his petition and by his own testimony in support of its allegations. It follows that in making his own case he has conclusively established against himself these propositions: The copy of the letter quoted did not contain the terms of his contract of em-

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ployment. No contract pleaded or proved stated the time when payment of a salary of \$100 a month should begin. Plaintiff was not to receive that amount monthly, until, to use his own words, "they could 'try me out,' " or "until they found I was the man they wanted." Whether he proved to be satisfactory after a trial depended on the will of defendant's board of directors. What plaintiff did not prove, to entitle him to \$100 a month, was that defendant's board of directors "tried him out" and found him to be satisfactory, or that they found him to be "the man they wanted." On this issue he had discussed the matter with two members of the board only, but was nevertheless asked: "You understood that you had made good and had done the work to the satisfaction of the corporation?" This was answered: "I certainly did, because one of them said, to use his expression, that I was entitled to my raise because I had done the work." Referring to the first day of April as the time for the increase, he also testified: "I felt that from that time on, at least, they could not have any objection to it." This comes far short of establishing an agreement by defendant that plaintiff was a satisfactory manager. That question could not be determined by plaintiff. It could not be settled by a mere expression of one of the directors. There is evidence that plaintiff's services were unsatisfactory and that efforts were being made to find a suitable person to take his place. The inference that he was satisfactory, in so far as it arose from his retention, was destroyed by undisputed evidence. The minutes of the corporation for which he was manager recited that his salary was \$75 a month. If the ledger kept under his supervision spoke the truth, it showed the same fact. He received that amount monthly and gave a receipt in full. Though he testified the time for receiving his increase was not definitely fixed by the contract, he never brought the matter to the attention of the board until he contemplated resigning. He knew there was discord among the members of the board, and he was warned by one of the di-

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the 1st of April, that an opportune time to matter of increasing his salary had not appeared he did not prove that defendant agreed \$100 a month from April to November, it follows that the evidence is insufficient to verdict.

THE JUDGMENT is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FILED JUNE 25, 1912.

HAMER, J., dissenting.

I am unable to agree with the majority opinion. A statement touching the facts and evidence is contained in that opinion. It appears that the plaintiff brought an action to recover an alleged unpaid balance of \$200 on his salary. He sought to recover for his services for the eight months from April to November, 1906. He recovered upon a trial to a jury a judgment for \$241.45. The majority opinion holds that the evidence is insufficient to sustain the verdict. It is said in that opinion that "plaintiff did not sue upon a *quantum meruit*, but upon a contract." Whether he sued upon a *quantum meruit* or upon a contract ought not to make much difference touching his right to recover, so long as he sued for his wages during a given period when his employment is undisputed, and the fact that he worked for the company and that the company received the benefit of his services is not denied. It is, to the mind of the writer, a rather technical distinction which would deny a plaintiff pay for his services because his petition set up a contract at so much per month instead of alleging the reasonable value of his services for the time he was employed. The majority opinion says: "Both parties agreed that plaintiff's salary for the months of January, February and March was fixed by the contract at \$75 a month and paid. For the months of December and January plaintiff received \$85 a month, and this compensation is not in dis-

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pute." The opinion says the minutes of the corporation recite that \$75 a month was the salary fixed by the defendant, and its vouchers show that plaintiff received that sum each month during the eight months in question. The plaintiff testified that he had previously been in a similar position as manager of a telephone company at Broken Bow; that he was present at a meeting of defendant's directors at Hastings in December, 1905, and that he told the board at that meeting that he was then drawing a salary of \$100 a month, but that Hastings was a larger town and there were larger opportunities for him there, and that it was agreed that he should work for a month or two at \$75 a month until the company could try him out; but the plaintiff testified that he told the directors of the company that he would not consider \$75 a month as a permanent salary. They told him that they would take the matter under consideration and notify him.

After the meeting of the board the manager of the defendant company wrote the plaintiff a letter, in which it was said: "Our board met this morning and decided to employ you under the conditions talked over when you were here, viz., \$100 per month, if they decide to retain you." The plaintiff went to Hastings and then went to work for the company. It seems that no particular time was fixed to begin the payment of \$100 a month. He seems to have spoken to two of the five directors of the company about bringing the matter up before the board, and he testified that they said that they would bring it up. In the language of the plaintiff, he was not to receive that amount monthly until "they could 'try me out,' " or "until they found I was the man they wanted." It is said in the opinion that the plaintiff did not prove that the defendant's board of directors "tried him out," or that they found him to be satisfactory, or to be "the man they wanted."

In answer to this contention, it appears that they kept him, and that he worked eight months in addition to the time for which he claims he was fully paid. It is the

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writer that, if the telephone company kept discharging him, it should have paid him expected to receive—\$100 a month—or, in any reasonable compensation for his services. He was not discharged, and presumably he was kept because he was more or less "satisfactory." In *Parcell v. McComber*, 11 Neb. 209, the plaintiff agreed to work a year for the sum of \$195, and he worked five months, and then sued for his wages. It was held that he could recover the actual value of his labor not exceeding the rate agreed upon, less any damage sustained by his employer by reason of the plaintiff's failure to work the entire year. In that case, as in this one, part of the money was paid as the work was performed. In *Burkholder v. Burkholder*, 25 Neb. 270, one brother agreed with another to continue in his service five years, when the brother was to give him a span of horses, wagon and harness. He failed to work the entire time, and it was held that, being susceptible of computation, a reference would be ordered to determine the amount of the deduction to be made. In *Harrison v. Hancock*, 2 Neb. (Unof.) 522, it was held that the reasonable value of the plaintiff's services should be allowed to him, although the contract had been abandoned by him. The same principle is announced in *Murphy v. Sampson*, 2 Neb. (Unof.) 297; *Harrison v. Hancock*, 2 Neb. (Unof.) 522. In *Small v. Poffenbarger*, 32 Neb. 234, the petition alleged that there was due from the defendant to the plaintiff for laborer's wages for work and labor done and performed by the plaintiff for the defendant at her request during the years 1886, 1887 and 1888 the sum of \$466.55, no part of which had been paid. Held to state a sufficient cause of action, although subject to a motion to make more definite and certain.

It would seem to have been the policy of our courts to allow the person employed reasonable compensation for his services, whatever the bargain may have been, and without reference to a strict construction of the contract. It would seem that, if the telephone company permitted

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the plaintiff to remain in its employ under circumstances which justified him in believing that he was going to be paid \$100 a month, then it should have paid him that sum; and, if the company kept him under circumstances inducing him to believe that he would receive a raise in his wages, then it should have paid him a reasonable compensation for his services, without reference to the contract, and that no technical rule of pleading should be invoked, even though severely correct.

I am of the opinion that the judgment should be affirmed, or, if reversed, that it should be with instructions for a reference to determine the amount of a reasonable compensation and to render judgment thereon for the plaintiff. It may be that the latter is contemplated by the majority opinion, although it is not so stated, and for this reason I make this contention so that the plaintiff may be apprised of his possible rights.

LEVI BURNS ET AL., APPELLANTS, V. SAMUEL W. HOCKETT
ET AL., APPELLEES.

FILED MAY 29, 1912. No. 17,478.

1. **Mortgages: FORECLOSURE: PARTIES.** Where a note and mortgage held as collateral security for the payment of a debt of mortgagees are unconditionally surrendered and redelivered to them, they are proper plaintiffs in a suit to foreclose the mortgage.
2. ———: ———: ———. Where a suit to foreclose a mortgage is properly commenced by the mortgagees, it may be prosecuted to final decree in their names as plaintiffs, though, pending litigation, they transferred their interest in the security and in the cause of action.

APPEAL from the district court for Clay county:
LESLIE G. HURD, JUDGE. *Affirmed.*

L. B. Stiner and A. C. Epperson, for appellants.

Paul E. Boslaugh, contra.

ROSE, J.

This is a proceeding by mortgagors to open a decree of foreclosure and to grant them a new trial under section 602 of the code, conferring on the district court power to vacate its own judgment, after the term at which it was rendered, for fraud of the successful party. From a judgment of dismissal plaintiffs have appealed.

In the foreclosure suit the mortgagees were plaintiffs and the mortgagors were defendants. In this proceeding the parties are reversed. The mortgage was given to secure payment of a debt of \$3,500 and was a lien on a lot in Harvard. It was due according to its terms November 1, 1912, but maturity was accelerated for non-payment of delinquent taxes. The only defense urged at the original hearing was that mortgagees were not authorized by the terms of the mortgage to declare the debt due. The district court held otherwise and the decree of foreclosure was affirmed by this court on an appeal by mortgagors. *Hockett v. Burns*, 90 Neb. 1.

For the purpose of this appeal the position of mortgagors may be summarized thus: In the foreclosure suit mortgagees were not the real parties in interest. Before bringing suit they had sold and transferred the note and mortgage to the Union State Bank and thereafter the assignee was the owner of the security. The bank would not have foreclosed the mortgage for nonpayment of taxes. Of these facts mortgagors had no knowledge while the suit was pending. The bringing and the prosecuting of the action in the name of the mortgagees and the failure to disclose the ownership of the note and mortgage amounted to a fraud for which a new trial should be granted under section 602 of the code.

At the time mortgagees decided to bring the suit, the note and mortgage were in possession of the Union State Bank. By formal assignment they were then held as collateral security for the payment of a debt owing by mortgagees to the bank, but a careful consideration of all

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of the evidence requires a finding that the bank had surrendered the note and mortgage to mortgagees without condition before the action was instituted, that they were the legal owners of the security when they filed their petition, and that the bank had full knowledge of their purpose to foreclose the mortgage and of their prosecution of the suit. This finding fully justifies the dismissal from which mortgagors have appealed.

The surrender and the redelivery of the note and mortgage to the payees transferred to them the title thereto. They were the legal holders of the security when they sued mortgagors. It is unnecessary to inquire whether the bank subsequently acquired their interest in the security or in their cause of action or decree. Since the suit was properly commenced by mortgagees, it was legally prosecuted to final decree in their names as plaintiffs. Code, sec. 45.

AFFIRMED.

GRACE A. MOORE, APPELLEE, V. WILLIAM LUTJEHARMS ET AL., APPELLANTS.

FILED MAY 29, 1912. No. 16,684.

Specific Performance: DEFECT IN TITLE: ABATEMENT OF PRICE. If a purchaser, at the time of entering into a contract for the purchase of real estate, is aware of a defect in the vendor's interest or title, or deficiency in the subject matter, he will not, in a suit for specific performance, be entitled to any compensation or abatement of price, unless equity and good conscience clearly require it.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Everson, for appellants.

Thomas & Shelburn and *J. G. Thompson*, contra.

FAWCETT, J.

This case is an aftermath of *Lutjeharms v. Smith*, 76 Neb. 260, to which reference is made for a clear statement of the transactions between the defendants in this case, Lutjeharms and Smith. Defendant Smith failed to comply with the decree entered in that case, requiring him to convey the land to Lutjeharms and deliver to him the patents and other title papers in his possession, and has ever since permitted the \$3,000 paid into court for his use, by Lutjeharms, to remain in the hands of the clerk. After that case was decided Lutjeharms conveyed to the defendant Goedecken. As shown in *Lutjeharms v. Smith*, Smith only owned an undivided one-half interest in the 80 acres in controversy, the title to the other half being in his sister. Subsequently to the termination of that case the sister died, testate. By her will, which was duly admitted to probate in Illinois and has also been probated in Harlan county, this state, she devised her one-half interest in the land to her daughter, the plaintiff herein, and she brought this suit for partition. In her petition she made Goedecken, the present owner, and Lutjeharms, and her uncle Smith, defendants. The parties all appeared and filed pleadings. Goedecken set up his title under his deed from Lutjeharms. Smith filed an answer and cross-petition in which he claimed that the decree in the former suit had been obtained against him by fraud, and asked that it be opened up and that he be permitted to defend. Lutjeharms set up the contract entered into between himself and Myers as agent for Smith, as shown in *Lutjeharms v. Smith, supra*, and prayed that, if the court awarded partition to plaintiff, it order the money now in the hands of the clerk to be retained by the clerk until the final disposition of the partition suit, and that out of such fund he, Lutjeharms, be compensated for whatever portion of the 80 acres, in the event of partition, or whatever sum of money might be paid to plaintiff in the event of the sale of the land, in

such suit. Goedecken has been in possession, claiming to be the owner, for something over four years. The district court entered a decree sustaining plaintiff's claim as owner of an undivided one-half of the land; found the amount of her half of the rental value, for the time Goedecken had been in possession, to be \$100; ordered partition to be made between plaintiff and Goedecken, if the same could be done without prejudice to the interest of the parties, the \$100 to be a first lien upon the portion awarded to Goedecken; that, if the land could not be partitioned, it be sold and divided between plaintiff and Goedecken, the \$100 to be paid to plaintiff out of Goedecken's half of the proceeds arising from the sale; found that defendants Smith and Lutjeharms were not necessary parties to the partition suit and dismissed their cross-petitions. Defendants Lutjeharms and Goedecken appeal.

The question we are called upon to decide is a very simple one. In *Lutjeharms v. Smith* we held: "Where the vendee of real estate is willing to accept the title of the vendor, the courts will not refuse to compel a specific performance of a contract because of a defect in the title." This is well-settled law. It is generally held that, "if the purchaser at the time of entering into the contract was aware of the defect in the vendor's interest or title, or deficiency in the subject matter, he is not, on suing for specific performance, entitled to any compensation or abatement of price." 36 Cyc. 742. While this rule, like all others, doubtless has its exceptions, it certainly ought to be applied in a case like the one at bar, where the record shows that defendants are not in a position to insist upon any refinement of equity in their behalf. The purchase by Lutjeharms from Smith was made through one O. H. Myers, a real estate agent of Alma, and the record shows that he and Lutjeharms knew the extent of Smith's title when the contract was entered into. With that knowledge Lutjeharms deliberately decided to make the purchase and take his chances on getting title to the entire tract.

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Myers, who now resides in Denver, was called by defendant Smith as a witness. He testified that at the time of his negotiations with Smith he and his partner, F. E. Herron, had an agreement with Lutjeharms that "we were to buy the land as cheap as possible, or rather sell it to him as cheap as possible; then have the privilege of reselling it and dividing the profits;" that Lutjeharms was to furnish the money and title was to be taken in his name. He also testified: "Q. I will ask you if Mr. Lutjeharms knew of the condition of the title of the south half of the southwest quarter of section 25? A. Yes, because we looked that up before we did any writing, and it shows on the plat and record that it does not belong to Mr. Smith. Q. What did Mr. Lutjeharms say relative to the title of that eighty prior to the time that he purchased it? A. Well, he thought that Smith could get his sister to sign the deed. Q. What did he say as to the title of that land? A. He said he would buy the whole thing and take the chances, because if he bought the 240 alone the price was a little bit higher; he was getting the eighty for, I believe, \$500, and he knew he could sell it for more money, or that we could. * * * Q. Mr. Myers, did you ever have any conversation with William Lutjeharms about transferring the south half of the southwest quarter of section 25 to William Goedecken? A. Yes. Q. State when and where that conversation was had, and what was said by Mr. Lutjeharms relative to transferring said land to William Goedecken. A. It was in our office, at the time of the making of the pretended sale; and, as he had sold the 80 for about twice what it cost him, I asked him about the division of the profits. He told me that he had to get the land out of his hands, out of his name, and his uncle understood how the title was—he could not furnish a good abstract and had to be responsible for the title, and probably would have to take it back. Consequently, Myers and Herron would have to wait until he knew where he was at himself. Q. What relation is Mr. Goedecken to the said Lutjeharms, if you know? A. He is Lutjeharms' uncle."

Lutjeharms himself testified in relation to this eighty as follows: "Q. When you were proposing to purchase it, what papers or records did you examine to find out where the title was? A. Myers examined it, I think. He said that one eighty was in the title of Mills. * * * Q. When did you look up the title? A. It was after we heard from Mr. Smith that we looked up the title. Q. Then you bought it the same day that Myers received that letter, without looking at the land? A. We had received a letter and knew that the land was for sale. Q. And you bought the land on that same day? A. After we got the letter? Q. Yes. A. I think so; he went up and looked at it first and explained how it was. Q. That was before you got the contract that he explained how it was? A. Myers? Q. Yes. A. Yes, sir."

This testimony shows beyond question that Lutjeharms and Myers knew all about Smith's interest in this eighty at the time they entered into the contract which they claim was based upon Smith's letter of September 3, 1903. This being true, Lutjeharms obtained in *Lutjeharms v. Smith, supra*, everything he was entitled to. He made his contract with Smith, knowing that Smith was unable to convey more than an undivided half interest in this eighty. He brought his suit for specific performance with that knowledge. He obtained a decree compelling Smith to convey the title he had. With his previous knowledge, he could not have obtained in that case, had he asked it, and cannot obtain in this, any abatement in the price which he agreed to pay and which in that case he has compelled Smith to accept.

Finding no error in the judgment of the district court, it is

AFFIRMED.

SAMUEL R. ROBERTS, APPELLEE, V. LAURA S. T. COX,
APPELLANT.

FILED MAY 29, 1912. No. 16,709.

1. **Contracts: REQUISITES.** "To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Melick v. Kelley*, 53 Neb. 509.
2. **Specific Performance: CONTRACT: EVIDENCE.** The transactions between the parties examined and set out in the opinion, held insufficient to establish the contract alleged in plaintiff's petition.

APPEAL from the district court for Scott's Bluff county:
HANSOM M. GRIMES, JUDGE. *Reversed with directions.*

L. L. Raymond, for appellant.

Wright, Duffie & Wright, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Scott's Bluff county for the specific performance of a contract of sale from defendant to plaintiff of the southwest quarter of section 7, township 21, range 53, in that county. From a judgment in plaintiff's favor, defendant appeals.

Succinctly stated, the correctness of the judgment depends upon the question whether plaintiff ever unconditionally accepted any offer to sell made by defendant, or defendant ever unconditionally accepted any offer to purchase made by plaintiff.

The negotiations between defendant, who resided in Chicago, and plaintiff, who resided in Scott's Bluff county, were conducted by one John C. Trotter, a real estate agent, who also resided in Scott's Bluff county. Some time about or shortly prior to June 1, 1908, defendant gave Mr. Trotter the following written authorization: "Mr. Trotter is authorized to sell my place adjoining town of Minatare for \$105 an acre, within six months from

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June 1st, 1908. $\frac{1}{2}$ cash if he can get it, not less than \$6,000 cash in any case, the remainder at 7% secured by first mortgage on the farm. Mr. Trotter to receive the regular commission of \$50 on the first thousand and \$25 on each succeeding thousand dollars of the purchase price. (signed) Laura S. T. Cox." On this memorandum Mr. Trotter indorsed the following: "I hereby accept the selling of the within named place or farm in accordance with the terms within named. (signed) John C. Trotter." Mr. Trotter did not succeed in selling the farm within the six months, and on December 4, 1908, defendant wrote him as follows: "My Dear Mr. Trotter: Ever since I received your letter, have been trying to decide what should be done about this matter. It is like this to me. I feel that I must have the \$16,000 clear. Perhaps if you show this letter to your buyer, he will realize that you are not trying to deceive him in any way about the commission. If he will pay me \$16,000 and your regular commission, abstract fees and any other expense of the transfer which may not occur to me, I am rather inclined to let it go, provided he will pay \$3,000 or \$4,000 down when he gets deed and possession. I would not feel safe to take less down than \$3,000. If he will be able to do this by March 1st, the sale can wait till that time. My tenant gets a forfeit from me if I sell under three seasons, and this I will pay. Your client can see that at \$105 per acre I should get a mere trifle above \$16,000, but I am not so determined about this that I might not let it go, if other conditions suited." On February 22, 1909, Mr. Trotter not having effected a sale, defendant wrote him as follows: "My Dear Mr. Trotter: Have been thinking some more about the farm deal and decided should your man be of the same mind still that I would write and offer to split the commission and transfer expenses with him, that is, he to pay \$16,000 for the place, and one-half of your commission, and any other transfer expense. If he will pay down not less than \$3,000, or as much more as he chooses, and \$3,000 more

in a year from time of sale, he can have any reasonable time on the remainder at 7 per cent. He can have until May 1st to do this, if he wants to do it. But as you know, I'm not anxious at all about selling, so it is all right, if he don't agree to my proposition. I would not take less than \$3,000 down, and would prefer \$4,000."

All of the authority conferred upon Mr. Trotter on or prior to April 19, 1909, is contained in the written memorandum and two letters above set out. On the last named date negotiations between plaintiff and Trotter were reduced to writing, as follows: "Minatare, Nebraska, April 19, 1909. This contract and agreement entered into by and between Laura S. T. Cox, party of the first part, and S. R. Roberts, of Scott's Bluff, party of the second part, witnesseth: That for and in consideration of the sum of \$16,425 to be paid by the said party of the second part, to the said party of the first part in the time and manner hereinafter specified, the said party of the first part has agreed to sell, and convey to the said party of the second part the following described land in Scott's Bluff county, Nebraska, to wit, the southwest one-fourth of section seven, township twenty-one, range fifty-three, less ten acres already sold on north side, but still containing one hundred and sixty acres. And the said party of the second part has agreed to purchase all of the above described land, and to pay for the same the said sum of \$16,425 in cash, as follows, \$100 cash in hand at the signing of this contract, the receipt whereof is hereby acknowledged, and that \$2,900 be paid on June first, 1909. And \$3,000 June first, 1910. Interest at 7% per annum, and \$10,425 to be paid June 1st, 1914, interest 7 per cent. per annum. And it is further agreed that at the time of payment of \$2,900 June first, 1909, party of the first part will convey by good and sufficient warranty deed, the above described real estate, consisting of one hundred and sixty acres together with all the improvements belonging to her, thereon, together with four shares of Minatare Mutual Ditch stock. The party of the first part

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hereby agrees that party of the second part shall have and collect the rent from said premises for the year 1909. And the party of the first part hereby agrees to furnish abstract showing clear title to all of said land, in the said party of the first part at the time of said transfer, and further agreed to give party of the second part possession of said premises March first, 1910. And it is further agreed that the covenants and agreements herein contained shall be binding on the heirs, executors and assigns of the parties hereto. In witness whereof, the said parties have caused these presents to be executed in duplicate and have hereunto set their hands this 19th day of April, 1909. In presence of J. C. Trotter. (signed) S. R. Roberts."

On the same day Mr. Trotter made and delivered to plaintiff a receipt as follows: "April 19, 1909. Received of S. R. Roberts check for \$100 for payment on land S. W. $\frac{1}{4}$ sec. 7-21, as per contract of this date. J. C. Trotter."

On May 9, after having received the proposed contract of April 19, defendant wrote Mr. Trotter as follows: "My Dear Mr. Trotter: Your note and contract for deed came to hand as well as the telegram, but you must have mistaken the sense of the agreement I made to sell quite a little. No one that I know of out there has given more than two shares of water with a quarter section of land, and as I knew this at that time as much as now, I cannot think I promised four water rights with my land. Then as to this contract, I would not sign anything of this kind, if I understand it, at all. It seems to me to bind me to sell my land with only \$100 down, and no security whatever. Now, Mr. Trotter, you know, no man would let property go in this way, and though I'm a woman I'm trying to learn about business, and I surely cannot. Had the three or four thousand been in the Minatare or S. Bluff Bank, for me, when you wanted me to contract away my land, it might have been different, but we may as well drop this selling for the present. I don't see why this year's rent could be expected anyway, when the ten-

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ant I have must have his year's crop begun, and should I make a sale to any one, it would always have to be, subject to any lease had previously contracted. I have taken some time to think of this, but I can't sign away the most valuable piece of property I have in this way. So drop everything about the farm until I come out which will be sometime in July." The letter then speaks of some other properties, and concludes: "But you know I've told you all the time I am not anxious to sell the land next to the town. I am not giving the right to sell any of my property to any one else. You shall sell it, when it goes. This much is due you for the trouble you have already taken about it. Am sorry to disappoint you by returning this contract unsigned, but it would not give me a safe deal, and I cannot do it. Better luck next time. Very truly, (signed) Laura S. T. Cox."

On May 16, 1909, and after receipt of the above letter, Mr. Trotter had prepared and signed by plaintiff another proposed contract, as follows: "Minatare, Nebraska, May 16th, 1909. Whereas on the 19th day of April, 1909, a certain contract in writing for the sale of the southwest one-fourth of section seven, township twenty-one, range fifty-three, in Scott's Bluff county, Nebraska, wherein Laura S. T. Cox is party of the first part, and S. R. Roberts of Scott's Bluff is party of the second part; and whereas it is stated therein that party of the first part as consideration for said lands is to receive therefor the sum of \$16,425 cash, part in money in hand, and the balance in payments, and whereas through the mistake, inadvertence and oversight of the party drafting the writing omitted therefrom the matter and manner of the securing of the said balance of deferred payments: Now, this writing is made and executed for the purpose to set forth the whole of said contract, and the said omission therefrom so as to show the contract as made by and between said parties which is as follows, to wit: Minatare, Nebraska, April 19th, 1909. This contract and agreement entered into by and between Laura S. T. Cox,

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party of the first part, and S. R. Roberts of Scott's Bluff, party of the second part, witnesseth: That for and in consideration of the sum of \$16,425 to be paid by the said party of the second part to the said party of the first part, in the time and manner hereinafter specified, the said party of the first part agrees to sell and convey to the said party of the second part the following described land in Scott's Bluff county, Nebraska, to wit: The southwest one-fourth of section seven, township twenty-one, range fifty-three, less ten acres already sold on the north side, but still containing one hundred and sixty acres. The said party of the second part agrees to purchase all of the said one hundred and sixty acres of land described above and to pay to the said Laura S. T. Cox therefor the said sum of \$16,425 in cash as follows: \$100 cash in hand at the signing of this contract, the receipt whereof is hereby acknowledged, and the sum of \$2,900 on the first day of June, 1909. The sum of three thousand dollars on the first day of June, 1910, with 7% interest from June first, 1909, to be evidenced by the negotiable promissory note of the party of the second part, bearing date June first, 1909, and to be secured by the first mortgage on said land of the party of the second part to the party of the first part duly executed and delivered, and the further sum of ten thousand four hundred and twenty-five dollars on the first day of June, 1914, with interest thereon at seven per cent. per annum payable annually to be evidenced by the negotiable promissory note of the party of the second part to party of first part, bearing date June 1st, 1909, and to be secured by the first mortgage on said land of party of second part to the party of the first part. It is further agreed that at the time of the payment of said two thousand nine hundred dollars, June first, 1909, or as soon thereafter as practicable, the said party of the first part will convey by good and sufficient warranty deed the above described real estate, consisting of 160 acres together with all the improvements belonging to her thereon, together with four shares of the Minatare

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Mutual Ditch stock. The party of the first part hereby agrees that party of the second part shall have and collect the rent from said premises for the year 1909. And the party of the first part hereby agrees to furnish abstract showing clear title to all of said land in the said party of the first part at the time of said transfer, and further agrees to give party of the second part possession of said premises March first, 1910. And it is further agreed that the covenant and agreement herein contained shall be binding on the heirs, executors and assigns of the parties hereto. In witness whereof, the said parties have caused these presents to be executed in duplicate and have hereunto set their hands this 19th day of April, 1909. In the presence of J. C. Trotter. (signed) S. R. Roberts." When this document was sent to defendant she made no answer to it, for the reason, as she testified, "I supposed what I had written before was all that was necessary."

It is upon this record that plaintiff bases his claim for specific performance of this so-called contract. We deem it unnecessary to enter upon any extended discussion of this record. It shows upon its face that Mr. Trotter had no authority to bind the defendant, as was attempted to be done, by either the agreement of April 19 or the amended agreement of May 16. That plaintiff knew the limitations upon Trotter's authority is fully shown by the uncontradicted testimony of Mr. Trotter, who, when introduced as a witness by plaintiff, testified: "The fact of the business is, that I submitted the correspondence between me and Mrs. Cox to Mr. Roberts to see what I could do. I followed Mrs. Cox's instructions as near as I possibly could. It was not my understanding that I was to do this, but there is nothing in this transaction that Mr. Roberts did not understand. He knew just what I could and what I could not do. There is nothing about this that I wish to withhold from the court, and I will answer anything." And again: "I did not put up any talk to Mr. Roberts, I simply showed him the correspondence, and showed him what I thought I had authority to

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'do." Again: "Q. Did you show him Mrs. Cox's letters?"

A. With reference to the contract, I certainly did. Yes.

Q. You showed him all you had? A. Yes, sir."

This is not, therefore, a case where plaintiff was dealing with an agent and relying upon any ostensible authority on the part of the agent. He knew exactly what the agent's authority was and the terms upon which the agent was authorized to sell defendant's farm. The terms proposed by defendant were not unconditionally accepted by plaintiff. Even in the amended contract of May 16 it is attempted to bind defendant to do things which she had never promised to do, and some of which, in her letter of May 9, 1909, she had expressly refused to do. It is clear that defendant never authorized the making of either the contract or amended contract, under which it is sought to bind her, and that the minds of the principals to this contract never met. It is also clear that by the letter of May 9 defendant declined plaintiff's offer to purchase, as outlined in the proposed contract of April 19, refused to sign or in any manner ratify that contract, and withdrew her farm from Mr. Trotter; and that thereafter he was without authority to in any manner represent or bind her in reference thereto. It follows that the district court was in error in awarding plaintiff specific performance of this so-called contract.

As the entire transaction between plaintiff and defendant, and Trotter, as defendant's agent, is fully disclosed by this record, and it clearly appearing therefrom that plaintiff is not entitled to any relief at the hands of defendant, this vexatious litigation against her should end. The judgment of the district court is therefore reversed and the cause remanded, with directions to the district court to dismiss the suit at plaintiff's costs.

REVERSED.

LETTON, J., not sitting.

**HENRY W. SWETT, APPELLANT, V. ANTELOPE COUNTY
FARMERS MUTUAL INSURANCE COMPANY, APPELLEE.**

FILED MAY 29, 1912. No. 17,096.

1. **Insurance: MUTUAL COMPANIES: BY-LAWS.** A by-law of a mutual insurance company, which expressly provides that buildings in which a stovepipe runs through the roof or side of the house, or enters the chimney at the bottom or in the attic, are not insurable by such company, is valid and binding upon the members of such company.
2. ———: ———: ———. And a by-law which provides that removal of personal property to any farm in the county shall not invalidate the insurance of the member, "provided, that the buildings into which it is removed are insurable in this company," is likewise valid and binding.
3. **Pleading: WAIVER.** Waiver is an affirmative defense, which, to be available, must be pleaded.
4. **Insurance: WAIVER.** The making, and demand for payment, by a mutual insurance company, of an assessment upon a policy of insurance, subsequent to a loss under such policy, will not be held to be a waiver of its terms, in the absence of a plea and proof of payment by the assured of such assessment.
5. **Quære.** Whether payment of such an assessment to a purely mutual insurance company would establish a waiver, *quære*.
6. **Trial: DIRECTING VERDICT.** Where it clearly appears from the pleadings and evidence that plaintiff is not entitled to any recovery, it is the duty of the court to direct a verdict for the defendant.

**APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Affirmed.***

Henry M. Kidder, for appellant.

O. A. Williams, contra.

FAWCETT, J.

The petition alleges that defendant is a mutual insurance company, organized under the laws of this state; that plaintiff applied for and obtained a policy of \$200

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on furniture, clothing and other household effects; that at the time the policy was issued plaintiff resided on section 18, town 23, range 6, in Antelope county; that after the issuance of the policy he removed to section 33, town 25, range 7, in said county; that the removal was with the knowledge and consent of defendant; that plaintiff had paid all dues and assessments up to the time of the fire, and had complied with all of the rules and regulations of defendant contained in its by-laws and in the policy of insurance; that the property was destroyed by fire February 22, 1908, and was of the reasonable value of \$302.20; that defendant refuses to pay the loss; and prays judgment for the amount stated in the policy. A copy of the policy and by-laws is attached to the petition and made a part thereof. The policy recites that it is issued in consideration of the cash premium and agreement in the assured's application. It also recites: "For further particulars see his application on file in the office of the secretary of this company, also articles of incorporation and by-laws annexed hereto, all of which are made a part of this policy." Section 8 of the by-laws reads as follows: "This company will not insure any old or dilapidated buildings; buildings with hay, straw, thatched, or rubber roof, or those that have a stovepipe through the roof or side of the house," etc. Section 15 provides: "The removal of personal property to any farm in the county shall not invalidate the insurance of the member. Provided, that the buildings into which it is removed are insurable in this company," etc. The answer alleges that the building situated upon section 33, into which plaintiff moved his personal effects, was not insurable in defendant company under the provisions of section 8 of the by-laws, for the reason that the stovepipes in said building passed through the ceiling and roof and not into any chimney, which rendered the personal effects of plaintiff uninsurable while contained in such building, as provided by section 15 of the by-laws; and that the fire which destroyed the property was caused and came

about because the pipes passed through the ceiling and roof and not into a chimney. The reply alleges that, subsequent to the fire and after the removal to section 33, the defendant made an assessment upon plaintiff of two mills on the full amount of his insurance policy, which was in the aggregate for \$1,525, and which included the destroyed property; and that, because of such assessment and demand for payment thereof, defendant is estopped to claim that the policy was not in force on the goods destroyed at the time of the fire. At the conclusion of the trial the court directed a verdict in favor of the defendant. Plaintiff appeals.

The evidence is in line with the pleadings above set out, and no good purpose would be served by setting it out here. The district court was evidently of the opinion that no liability of the defendant ever attached to the articles of personal property, while contained in the un-insurable building situated on section 33. In this we think the court was right.

The alleged waiver or estoppel is not sufficiently pleaded. The allegation of the reply is: "That because of the said assessment and demand for payment the defendant has waived the conditions of the by-laws, and that because of said facts defendant is estopped to now claim that the said policy was not in force on the goods destroyed at the time of the said fire." Plaintiff does not allege that he paid the assessment. All the evidence shows is that, in the regular course of business, on October 19, 1908, an assessment notice in the usual form was sent out to the members of defendant company. The one mailed to plaintiff notified him that the assessment on his policy was two mills, or \$3.06. This amount would be two mills upon the aggregate amount of plaintiff's policy. Not having alleged payment of the assessment, plaintiff is not in position to insist upon a waiver.

AFFIRMED.

CHARLES HENRY TOWNSEND, APPELLANT, v. GEORGE A.
SWALLOW ET AL., APPELLEES.

FILED MAY 29, 1912. No. 16,660.

1. **Judgment: INTEREST.** When a court of equity decrees the specific performance of a contract to convey real estate upon the payment of a specified amount at a specified time, such decree will not ordinarily bear interest during the time so specified for payment.
2. ———: **PAYMENT: CHECKS.** A decree for the payment of money means lawful money of the United States; the creditor is not required to receive private checks as a compliance with the decree.
3. **Interest: DEPOSIT IN COURT.** The claim of interest on money deposited in court as a performance of the contract sued upon in equity must be determined upon a consideration of all the equities existing between the parties.

APPEAL from the district court for Boyd county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

W. T. Wills and J. H. Macomber, for appellant.

D. A. Harrington, M. F. Harrington and John A. Davis, contra.

SEDGWICK, J.

In May, 1906, the defendant George A. Swallow was in possession of the real estate in question as the tenant of the plaintiff, and the parties then entered into a contract whereby the plaintiff agreed to sell to the defendant the said premises for \$4,000, subject to an outstanding mortgage. The defendant paid \$25 on the contract. Afterwards, the defendant still being in possession of the premises, the plaintiff brought an action against him in the district court for Boyd county to cancel the contract and obtain possession of the land. In the commencement of the original action the plaintiff tendered to the defendant and deposited with the clerk the \$25 which

had paid upon the contract at the time it was made by the defendant, by his answer and cross-petition, for a specific performance of the contract. He also tendered to the plaintiff as a performance of the contract, and deposited with the clerk, corporate stock of the par value of \$2,000, which he alleged the plaintiff agreed in the contract to receive as part payment for the land, and also tendered and deposited with the clerk \$1,975 in currency which, with the \$25 he had paid to the plaintiff upon making the contract, he alleged was the balance of the purchase price. Upon the trial of the cause the court found generally for the defendant, but rejected the tender of the corporate stock and required the defendant to make payment of the balance due upon the contract in currency, and found that the amount due from the defendant to the plaintiff upon the purchase price was \$4,077.46. In computing this amount the court credited the defendant with the \$2,000 on deposit with the clerk, which included the \$25 paid by the defendant at the making of the contract, so that the plaintiff was entitled to a return of the \$25, which he had deposited with the clerk and which would have been due to the defendant if the court had canceled the contract and had quieted the plaintiff's title in the land. The trial court decreed that upon the payment of \$4,077.46 within 60 days from the date of the decree the plaintiff should execute to the defendant a warranty deed for the premises, and upon his failure to execute such deed the decree should operate as such conveyance. The defendant was dissatisfied with the decree, and executed a supersedeas bond and took some other steps preparatory to an appeal. He failed to perfect his appeal, and after more than a year had elapsed the plaintiff filed a "motion and petition" in the action, alleging the former decree of the court, that the time for appeal had elapsed, that there was no appeal pending, and that the defendant had "totally and absolutely failed and neglected to comply with said decree." The defendant answered, admitting the decree, and alleging that within 60 days after the

decree he paid into the hands of the clerk the full amount of the decree, and that this payment was made with the consent of the plaintiff. He asked that the "motion and petition" be denied, and that a decree be entered quieting the title. A trial of this issue was had, a finding and decree for defendant, and plaintiff has appealed.

It appears that within 60 days after the entry of the first decree there were negotiations between the parties looking to the settlement of the matter and the abandonment of the proposed appeal. It was agreed between them that the plaintiff should allow \$100 discount from the amount of the decree, and the defendant should pay the balance in full as a final adjustment of the matter. After this had been agreed upon between the parties they went to the office of the clerk of the district court to complete the settlement. The defendant George Swallow testified that his father, James Swallow, assisted him in the settlement and was duly authorized. It appears that in making their settlement, before going into the clerk's office, the plaintiff's attorney had considered that the plaintiff was entitled to interest upon the decree from the date thereof, and that in offering to discount \$100 the intention was to discount the \$100 from the amount so computed. There is some conflict in the evidence upon this point, but it appears that the balance agreed upon as due the plaintiff, in addition to the \$2,000 on deposit in the clerk's hands, was \$2,111.78, \$34.32 having been added as interest. Interest is not ordinarily allowed upon such decrees if payment is made within the time limited. *Cobbey v. Knapp*, 28 Neb. 158. It also appears that in making their computation in the settlement it was considered that the \$25 which the plaintiff had deposited with the clerk would be returned to him, and that amount was not included in the amount agreed upon to be paid by the defendant. When they stated their settlement to the clerk, he first made an entry upon his docket showing that there was \$2,000 upon deposit. He then made an entry upon his docket showing that the

amount that the parties had agreed upon to be paid by the defendant was paid into court, and the defendant George Swallow drew his check in favor of the clerk upon a local bank for \$475, and his father, James Swallow, drew his check upon a bank in Shenandoah, Iowa, payable to the clerk, for \$1,636.78, the two checks amounting to \$2,111.78, the amount agreed upon to be paid by the defendant. The clerk then deducted the costs which had been adjudged against the plaintiff, \$29, from the \$2,000 upon deposit, and at the request of the plaintiff drew his check for \$100 for the discount agreed upon by the parties, and also drew his check for \$1,871 in favor of the plaintiff, being the balance of the \$2,000 on deposit. The two checks drawn by the defendant and his father were indorsed over to the plaintiff by the clerk, and these four checks, amounting to \$4,082.78, were supposed by the parties to be the amount which the plaintiff was to receive from the clerk. The clerk wrote a receipt for this amount upon his docket, which was signed by the plaintiff. The plaintiff then asked for the \$25 which he had deposited, and it was discovered at once that they had made a mistake in the computation in that amount. The defendant retained the one hundred-dollar check and the clerk's check for \$6.56 costs which had been advanced by him, and afterwards cashed these checks at the bank.

It appears that the first default in carrying out the settlement that had been agreed upon was the defendant's refusal to correct the mutual error whereby he was allowed a credit for the \$25 which belonged to the plaintiff. The plaintiff could not be required to receive checks in lieu of currency in the payment of his judgment, but consented to do so in the settlement, and when the defendant refused to correct the error and complete the settlement as made the plaintiff refused to receive the checks. The evidence shows that the checks were good, and that the defendant might easily, if he had desired, substitute the currency therefor, but he refused to do so. Within 30 days after the failure of the settlement defendant paid

into court the additional \$25, thus making good the error in the computation, and the plaintiff might then have received the checks and would have the benefit of the settlement substantially as agreed upon, but he then stood upon his technical right to currency instead of the checks, and also demanded interest for the short time that had intervened since the settlement. Mutual stubbornness prevented the completion of the settlement, and has occasioned this subsequent extensive litigation. It appears that the defendants have, during all of this time, been in possession of the farm and received the rents and profits therefrom. The plaintiff refused to receive the \$1,975 deposited with the clerk by the defendant before the trial of the original action, and refused to allow the defendant to complete the purchase of the land upon any terms. It was found by the court that he was in error in so refusing. It seems therefore inequitable to allow him to recover from defendant interest on the money so paid by defendant. The defendant should have corrected the error when discovered, and should have then paid the additional \$25. The plaintiff was not bound to receive the amount tendered him without this \$25, nor to receive checks in payment if their settlement failed, and it seems therefore that he is entitled to interest on the balance due him under their settlement from the expiration of the 60 days allowed the defendant by the court in which to make payment. Plaintiff has paid the \$100 discount agreed upon and should now receive for the land the amount agreed upon in settlement, \$2,111.78, and the currency in the hands of the clerk when settlement was agreed upon, \$2,000, amounting to \$4,111.78, less the amount deposited by the defendant with his answer, \$1,975, and \$29 costs adjudged against plaintiff, \$2,004, leaving a balance of \$2,107.78, and should pay the additional costs adjudged against him herein. Defendant is entitled to the \$2,025 currency now in the hands of the clerk if he fails to complete the contract and plaintiff keeps the land, and should pay the additional costs adjudged against him herein,

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The judgment of the district court is therefore reversed and the cause remanded, with instructions to sustain the motion of the plaintiff and enter decree quieting his title in the land in question against the defendants and all persons claiming through or under them since the commencement of the original action, upon payment of the costs adjudged against him upon the first trial, unless the defendants pay into court for the plaintiff within 60 days after the entry of the decree the sum of \$2,107.78, with interest thereon at 7 per cent. per annum from the 10th day of June, 1908, to the date of such payment, and that upon such payment the plaintiff shall execute to the defendant George A. Swallow a good and sufficient warranty deed for the said premises with the usual covenants of warranty. Upon failure so to do, the decree shall operate as such conveyance. One-half of the costs in the trial court since the original decree and in this court to be taxed against the defendants and one-half against the plaintiff.

REVERSED.

WILLIAM E. HARVEY, APPELLEE, v. T. B. BOWMAN,
APPELLANT.

FILED MAY 29, 1912. No. 16,714.

Appeal: CONFLICTING EVIDENCE. This is an action at law, tried by the court without a jury. The evidence is somewhat conflicting, but sufficiently supports the judgment, which is accordingly affirmed.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed.*

C. E. Spear, F. J. Mack and H. C. Vail, for appellant.

H. Halderson and O. M. Needham, contra.

SEDGWICK, J.

The plaintiff recovered a judgment in the district court for the value of eight loads of corn. One Smith was farming the plaintiff's land on shares, and delivered the corn to the defendant, who was dealing in grain. The defendant admits that he bought eight loads of corn delivered by Smith, but testifies that the first three loads delivered belonged to Smith and not to the plaintiff, so that the controversy is in regard to the value of the three loads.

The scale checks taken by Smith are in evidence; the first three are made out to Smith, and the remaining five to the plaintiff, and the defendant testifies that when Smith contracted the corn with him he represented it to be his own corn, and after three loads were delivered Smith refused to deliver any more of his own corn, and afterwards delivered the five loads as the corn of the plaintiff. The defendant seems to be candid in the matter, and the conduct of Smith does not appear to be entirely consistent, but the defendant's own evidence is not sufficient to constitute a defense. He admits that he bought the corn, and that he has not paid for it, and that the grain checks which he gave for the corn were, before the commencement of the action, in the hands of the plaintiff who claimed to be the owner of the corn. The plaintiff and Smith both testify that the corn belonged to the plaintiff, and statements made by Smith, at the time he contracted it, that it was his own corn do not overcome this testimony.

The defendant deposited money in the bank for the five loads of corn, and insists that the judgment is therefore in any event too large, but he never made legal tender of any amount to the plaintiff, and deposited this money as payment in full of the plaintiff's claim. He is therefore not entitled to credit on this claim for the deposit in the bank.

The judgment of the district court is sufficiently sustained by the evidence, and is

AFFIRMED.

FRANK WILLIER ET AL., APPELLANTS, V. JAMES CUMMINGS
ET AL., APPELLEES.

FILED MAY 29, 1912. No. 16,716.

1. **Wills: CONSTRUCTION: POWER TO SELL HOMESTEAD.** If a testator, who has no real estate except his homestead, provides in his will that all of his debts shall be paid out of the personal property if that is sufficient, a provision in the will that if the personal property is not sufficient the executor is authorized "to sell so much of my real estate as may be necessary for that purpose" gives the executor power to sell so much of the homestead, subject to the life estate of the testator's widow, as may be necessary to pay the debts.
2. ———: **POWER OF SALE: RECITALS IN DEED.** It is not necessary to the validity of a deed, executed by the donee of a power to convey, that the intention to execute the power should appear by express terms or recitals in the instrument.
3. ———: ———: **EXECUTION OF POWER.** An executor with power under the will to sell the homestead of decedent, subject to the life estate of the widow, to pay the debts of the testator, applied to the district court for license which was granted; sale was made accordingly and confirmed by the court and the proceeds applied in payment of the debts. In these proceedings no reference was made to the power under the will. The sale of the homestead for such purpose being invalid without the power given by the will, and the executor having no personal interest in the real estate, it is *held* that such sale and deed are valid as an execution of the power.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

Albert & Wagner, for appellants.

A. M. Post and W. N. Hensley, contra.

SEDGWICK, J.

At the time of his death Daniel Schucker was residing with his wife and children on a homestead consisting of 80 acres of land, which it appears to be conceded was not

worth more than \$2,000. He had no other real estate, and left a will which contained this provision: "I direct that all my debts and the expenses of administering my estate and funeral expenses be paid out of my personal property. If that be insufficient, then I authorize my executor to sell so much of my real estate as may be necessary for that purpose. Second, I give and bequeath to my wife, Maria Schucker, all of my property, both personal and real, during her lifetime, and in the event of her death, I direct that the balance and residue of my property be divided among my living children (naming them)." He left certain debts, and the executor of the will applied to the district court for license to sell 40 acres of land to pay the debts of the deceased. The license was duly granted and the land sold thereunder to defendant James Cummings. The sale was confirmed and deed ordered, which was duly executed and delivered. The plaintiffs, who are the residuary legatees under the will, brought this action in ejectment to recover the land. They were unsuccessful in the district court and have appealed. It is contended that the will should not be construed to authorize the sale of the homestead to pay debts; and, second, if it should, this sale was not made under the power given in the will, but under the statute which authorizes such sale only when the debts are a lien upon the land, and that such sale of the homestead is therefore void.

1. It is urged in the argument that the will is drawn from a form found in Maxwell's Justice Practice, and that the language was used inadvertently and without any intention to charge the homestead with the debts of the deceased. Several authorities are cited which hold that a recital in the will that the testator desires to have all of his debts paid will not have the effect to authorize the executor to sell the land for that purpose. It appears that at the common law the real estate of deceased was not subject to payment of his debts, and courts of equity then held that, if a will contained a devise of real estate with a recitation that the testator desired to have his

debts paid, such a recitation would be construed in equity to create a charge upon the land for that purpose. In this country, the real estate of the deceased being subject to the payment of his debts by statute, the recitation in the will that the testator desired to have his debts paid, or even the express provision that his debts should be a charge upon the real estate, would be without effect, because such expressions in the will would add nothing to the force of the statute and would therefore be meaningless; but, if the real estate is a homestead and is not under the statute liable for the debts of the deceased, and the testator has no other real estate, a provision in the will that the executor shall sell the real estate to pay debts is not meaningless. Our homestead act provides that the owner of the fee in the homestead may dispose of the same by will subject to the life estate of the surviving spouse, and this was the effect of the will in question. The manner of executing a will and its formal parts may be suggested by an approved form, but the granting clauses and the beneficiaries of the testator's bounty must be presumed to have been intended by the testator as they appear in the instrument itself. Lawyers do not depend upon forms in determining who shall be the beneficiaries under the will of the testator, and we cannot say that plain and unequivocal language like this was used inadvertently and refuse to give effect to the will of the deceased.

2. Neither the application for license to sell this real estate nor any other of the proceedings in that behalf contained any reference to the power of sale in the will. For this reason the plaintiffs contend that there was no intention on the part of the executor to execute the power, and that the deed is therefore void. The supreme court of the United States said, quoting from an opinion of the supreme court of Illinois: "All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument." *Warner v. Connecticut Mutual Life Ins. Co.*, 109 U. S. 357. In 2 Perry, Trusts (2d ed.) sec. 511c, it is

said: "The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear: (1) When there is some reference to the power in the instrument of execution; (2) where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and (3) where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power. * * * If the grantor has no interest in the land, his deed will be insensible and mere absurdity, if not intended as an execution of the power, * * * if it refers to the subject matter of the power, or describes the land over which his power extends." Many authorities are cited by the author, and we have no doubt of the correctness of the rule so announced. In this case the donee of the power had no interest in the land, and his deed would have no operation if it was not the execution of a power. Indeed, the power which the court attempted to give him was precisely the power which the will gave him, and his deed as executor conveys the land as the will authorized him to do. The supreme court of Illinois so determined this precise question in a summary manner in *Purser v. Short*, 58 Ill. 477. Plaintiff's counsel cites some cases which appear to take a contrary view; among them, *Jay v. Stein*, 49 Ala. 514. The case was decided by a divided court, one of the three judges dissenting. In a later case language was used by that court which indicated a modification of their views. *Matthews v. McDade*, 72 Ala. 377.

For the reasons stated, the decree of the district court is right, and it is unnecessary to discuss the questions

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that are raised in regard to adverse possession and the statute of limitations.

The judgment of the district court is

AFFIRMED.

WILLIAM BARTELS V. STATE OF NEBRASKA.

FILED MAY 29, 1912. No. 17,375.

1. **Criminal Law: STATUTE: CONSTITUTIONALITY.** The act of 1907, laws 1907, ch. 167 (criminal code, sec. 117c), defining poultry stealing and providing a penalty therefor, does not violate that part of section 11, art. III of the constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."
2. ———: **INSTRUCTIONS: REASONABLE DOUBT.** An instruction in a criminal prosecution that the rule that requires proof of guilt beyond a reasonable doubt "is not intended to aid any one who is in fact guilty to escape," and which intimates that an acquittal must be justified and a verdict of not guilty must be "authorized," is erroneous. In the condition of this record, it is found to be prejudicially erroneous.
3. **Larceny: EVIDENCE.** The evidence is discussed in the opinion, and is found insufficient to support a conviction.
4. ———: **POULTRY STEALING: PENALTY.** Under the act of 1907, defining and providing a penalty for poultry stealing, if the value of the property stolen is less than \$35, the penalty as for a felony should not be inflicted, except in cases of habitual crime, or when the act is accompanied with circumstances of aggravation.

ERROR to the district court for Dakota county: GUY T. GRAVES, JUDGE. Reversed.

D. H. Sullivan and R. E. Evans, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

SEDGWICK, J.

The defendant (plaintiff in error here) was convicted

in the district court for Dakota county under chapter 167, laws 1907 (criminal code, sec. 117c). The section is as follows: "If any person shall steal any chickens, ducks, turkeys, geese, pigeons, or guineas of any value or, if any person shall receive or buy any chickens, ducks, turkeys, geese, pigeons or guineas, that shall have been stolen, knowing the same to have been stolen, with intent, by such receiving or buying, to defraud the owner; or, if any person shall conceal a poultry or pigeon thief, knowing him to be such; or, if any person shall conceal any chickens, ducks, turkeys, geese, pigeons or guineas, knowing the same to have been stolen; every such person so offending shall be imprisoned in the county jail not less than ten days nor more than six months or in the state penitentiary for not more than three years nor less than one year, in the discretion of the court."

1. It is contended that the act violates section 11, art. III of the constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." It is said that, "if it is permitted to stand, it amends section 119 of the criminal code, and makes no reference to section 119, nor does it pretend to repeal that section." A similar act is considered and upheld in the recent case of *Wallace v. State*, ante, p. 158. That was a prosecution for hog stealing under section 117b of the code. Former decisions of this court are referred to, and the discussion and conclusion are entirely applicable to the question here presented.

2. It is also contended that the act is unconstitutional because more than one subject is contained in the title and in the act. The title of the act is: "An act to provide a penalty for stealing live poultry or pigeons, for receiving buying or concealing live poultry or pigeons, knowing the same to have been stolen, and for concealing poultry or pigeon thieves." The point insisted upon appears to be that poultry and pigeons are two different subjects of legislation and cannot be legislated upon in the same act. Poultry, according to the definition in

Webster's New International Dictionary is: "(2) Domestic fowls reared for the table, or for their eggs or feathers, such as cocks and hens, capons, turkeys, ducks and geese." Pigeons, if "reared for the table," are within the definition. The fact that pigeons are poultry and might have been considered as included in that term will not affect the question. If the title of the act had specifically named other poultry, as turkeys and geese, it would probably not be contended that for that reason the act is unconstitutional.

3. It is objected that the evidence is not sufficient to support the verdict. The witness Frank Phillips testified that in January of last year he was employed by the defendant as a farm hand, and that on the evening of about the 25th of January the defendant requested the witness and one Chester Ream to go with him to the place of one Bridenbaugh and steal his chickens; that they went accordingly, and defendant took some sacks from his granary to carry them in, and they made three several trips, each time filling three several sacks, stealing in all 56 chickens; that they took the chickens to the defendant's place and put them in an ice house that night, where they remained until the following night, when the witness and the defendant went to the ice house and cut off the tails of the roosters and placed them in the chicken house with the chickens of the defendant; and the following morning the little boy, about eight years old, opened the chicken house door and allowed the chickens to escape; that the defendant then put up a few feet of wire netting to keep the chickens from returning to their former owner. The defendant is a well-to-do farmer, with 280 acres of land where he has lived from 15 to 20 years, and has a family consisting of his wife and, at that time, two children, and they had at that time quite a number of chickens of their own, at least several hundred. It was no theory of the prosecution that the defendant stole these chickens because of gain or because of any use he had for them, but the witness testified that the defendant had

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shortly before that time bought some straw of Mr. Bridenbaugh and had failed to get the straw he had paid for, and he became very angry with Mr. Bridenbaugh and proposed to steal these chickens to "get even with him."

There is no evidence corroborating this testimony of the witness Phillips, unless the following circumstances should be thought to support his testimony: Mr. Bridenbaugh testified that a day or two after the chickens were taken he was at the defendant's place and saw a large number of chickens, two or three hundred, and among them he saw two or three that had their tails cut off. He testified that he thought he saw some of his chickens there, but he did not pretend to identify them; and, being asked, "And you take one of your roosters and put him up besides Mr. Bartels' rooster and there was no difference in their tails, you couldn't hardly tell which chickens were yours or Mr. Bartels'? A. All were Plymouth Rock chickens. Q. All alike exactly?" He did not answer this question. Some time after the chickens were missed by their owner, a young man who resided in that neighborhood was riding by the defendant's place, and he testified that he noticed the defendant's chickens as he went by, and he was asked this question: "You may state whether you noticed any bob-tailed roosters there." He did not answer the question directly, but his answer would indicate that he intended to testify that he did. On cross-examination he was asked: "You couldn't tell whether cut with pair of sheep shears, or razor, or whether pulled out? A. No; so many there. I noticed they were bob-tailed." Another witness who passed the place some five or six months later gave similar testimony.

If the theory of the prosecution was that the defendant attempted to remove any of the distinguishing characteristics so that the stolen chickens could not be identified, this testimony would of course amount to nothing. It was shown without dispute that the defendant had upon his premises very many chickens that would have fully answered the description that these witnesses gave of

those they observed. The evidence of the witness Phillips then is wholly uncorroborated, and his testimony was contradicted by the defendant, the defendant's wife, and the witness Chester Ream, the defendant's brother-in-law, all of whom testified emphatically to circumstances and conditions which, if true, render it impossible that the defendant could have taken the chickens, as alleged by this witness.

This witness quarreled with defendant's wife about three months after the chickens were missed and was discharged by defendant. The defendant and his wife both testify that when discharged he was very angry and made threats that he would get even with defendant. The witness admits the quarrel and discharge, but denies the threats, and testifies that he immediately declared the defendant had stolen the Bridenbaugh chickens, and began this prosecution against the defendant. The defendant, his wife and brother-in-law all testify that on the evening of the 26th of January Phillips borrowed defendant's horse, representing that he wanted to visit his sister some few miles distant; that he was gone nearly the whole night, returning about 3 o'clock the following morning. The defendant testifies that when he went to the stable about 7 o'clock in the morning Phillips was cleaning the horse, removing harness marks which showed plainly that the horse had been driven hard in harness. This, Phillips denies, but he did not visit his sister, and is not corroborated in his explanation of his whereabouts during the night. Six or seven, apparently respectable, men, merchants and other business men, without any apparent interest in the controversy, testified that they had known the witness Frank Phillips for many years, knew thoroughly his reputation for truth and veracity in the community where he lived, and that it was bad. This evidence was not contradicted, except that one witness testified that some people said his reputation for truth and veracity was good and some said it was bad. Also an attempt was made, which was at least partially successful, to impeach

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the defendant, but there was no attempt to impeach the defendant's wife, nor the witness Chester Ream. If the testimony of a witness can be discredited by impeachment, it would seem that the witness Phillips was effectually discredited.

The court instructed the jury: "The jury are instructed that one of the modes recognized by law for impeaching the veracity of a witness is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached in the neighborhood in which he resides; and, if the jury believes from the evidence in this case that the general reputation of the witnesses Frank Phillips and William Bartels for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard the whole of their testimony and to treat it as untrue, except where it is corroborated by other credible evidence or by facts and circumstances proved on the trial." If the jury had observed this instruction, they must have considered the evidence of the witness Phillips, wholly uncorroborated and discredited by impeachment as it was, insufficient to establish the guilt of the defendant beyond a reasonable doubt.

It seems probable that the jury were misled by the following instruction given by the court: "The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man

cause, it is insufficient to authorize a verdict. If, after considering all the evidence, you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." This was the only instruction in which an attempt was made to define "reasonable doubt," except that in another instruction it is said: "The state must establish every material allegation in the information beyond a reasonable doubt, that is, to a moral certainty." If we consider that the witness Phillips was by his own testimony an accomplice in guilt, and that his evidence is wholly uncorroborated, it would seem probable that the jury by the eleventh instruction above quoted were led to believe that there must be some special circumstances in the case "to justify an acquittal" and "authorize a verdict of not guilty."

4. The defendant was sentenced to imprisonment in the penitentiary for a period of not less than one year nor more than three years, and it is urged that the sentence is excessive. The statute leaves a large latitude to the discretion of the court in fixing the penalty from ten days in the county jail to three years in the penitentiary. The statute is a new one, and it seems that the legislature considered that there might be circumstances under which the extreme penalty should be inflicted. If a defendant has prepared himself for the business of poultry stealing and practices it persistently for gain, it calls for more serious consideration than does a first offense done in anger and as a means of retaliation for a real or supposed injury. When the value of the property taken is less than \$35, imprisonment in the penitentiary should be inflicted only in cases of habitual crime, or accompanied with violence or breaking or other circumstances of aggravation. The punishment in this case seems excessive. If the defendant should be found guilty, his offense would be regarded rather as a misdemeanor than a felony. Because of this insufficiency of the evidence and the erroneous definition of "reasonable doubt," it seems clear that the de-

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fendant has not had such a trial as the law awards to all persons accused of crime.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON and ROSE, JJ., dissent.

FRANK KEENAN, APPELLANT, v. JOSEPH SIC, APPELLEE.

FILED MAY 29, 1912. No. 16,636.

Pleading: JUDGMENT ON THE PLEADINGS. In an action of replevin, the defendant pleaded title in himself. The specific allegations and admissions in the reply were inconsistent with the claim and ownership set forth in the petition. *Held*, That the motion of defendant for judgment on the pleadings was properly sustained.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Affirmed*.

James R. Swain and H. C. Vail, for appellant.

A. E. Garten, contra.

HAMER, J.

This is an action of replevin. The plaintiff, Frank Keenan, who is the appellant in this court, says in his petition that he is the owner and entitled to the immediate possession of a two-thirds interest in and to about 30 acres of wheat now in the shock or stack on the S. E. $\frac{1}{4}$ of 17-19-8, in Boone county, Nebraska, of the value of \$500; that the defendant wrongfully and unlawfully detains said goods and chattels from the possession of the plaintiff, and has detained the same for the space of ten days, to plaintiff's damage in the sum of \$50. The prayer is for judgment that the defendant return the property to the plaintiff and for damages, or for \$550, the value of the property in case a return cannot be had.

The defendant answered, first, by a general denial; and, second, that on the 11th day of January, 1909, he, the said defendant, entered into a contract to purchase the land upon which wheat was then growing, being the land described in plaintiff's petition; that this contract was made with the plaintiff and others who were the owners of said land, and that said contract was in writing, and that said writing made no reservation of said wheat, or any part thereof, and that on or about March, 1909, the defendant entered into possession of said premises under and by virtue of said agreement. For his third defense, the defendant answered that on the 22d day of January, 1909, the plaintiff and others, as owners of the land mentioned in the plaintiff's petition, executed and delivered to the defendant a deed of general warranty, without any reservation of said wheat then growing on said land, by the terms of which the plaintiff, Frank Keenan, conveyed to the defendant all interest in said land, without any reservation whatever; that said deed was duly delivered to the defendant on or about the 17th of March, 1909, and was duly recorded in the records of Boone county; that in said deed the plaintiff, Frank Keenan, together with other grantors, covenanted that said land was free from incumbrance, except as to one mortgage of \$700, and warranted said title against any other incumbrance, and covenanted to defend the title of said land against the claims of any person whatsoever, with no reservation as to said growing wheat on said land. Fourth. It is alleged that said wheat was not reserved by the plaintiff, but was delivered over to the defendant, and is his sole and separate property. Fifth. The defendant alleges the value of said wheat is about \$600. It is also alleged in said answer that, by reason of the replevin and the defendant's interruption of possession, he has been damaged in the sum of \$200, no part of which has been paid. The defendant prays judgment against the plaintiff for the property replevied and for its return to the defendant

or, if the same cannot be returned, for the value thereof in the sum of \$600 and for damages in the sum of \$200.

The reply admits the allegations in the answer to the effect that defendant entered into a written contract for the purchase of the land upon which the wheat in controversy was grown, and that the owners of said land after the execution of the contract executed and delivered a deed to said land to the defendant, and that there was no special reservation of the wheat in controversy in said contract or deed, but that said wheat was specially reserved by the plaintiff and the owners of said land *by parol*, both at the time the contract of sale was executed and the deed, and that the defendant agreed at said times that said wheat should be reserved to the plaintiff. It is also alleged in the said reply that the defendant agreed that he would settle with the plaintiff for said wheat. In the second paragraph of his reply, the plaintiff alleges that he told a third party, who was transacting the business of the sale, that the wheat must be reserved to him, and that said third party by a mistake failed to put a reservation of that kind in the contract and deed. It is further alleged in said reply that the plaintiff had the land on which the wheat was grown rented for the year 1909, and for several years before that, and that his interest in said wheat was acquired by virtue of a lease, which was oral, and which was made with the administrator of the estate of Margaret Keenan, deceased, and that said lease was in full force and effect at the time of the sale of said land, and the plaintiff delivered possession of the same with the understanding and agreement that he was to be paid for his wheat or that he could harvest the same.

On these pleadings the defendant, Joseph Sic, moved for judgment, because no cause of action is stated, and because the pleadings construed together constitute no cause of action. This motion was sustained, and the court found at the time the cause of action was commenced the right of property and the right of possession in the

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property were in the defendant, Joseph Sic, and that the value of the property was \$350. Judgment was rendered in favor of the defendant, that he was the owner of the right of property and the right of possession, and that he have a return of said property or its value in the sum of \$350, and that he recover his costs. No testimony was taken, and the judgment rests upon the pleadings and motion in the case.

The plaintiff contends that parol testimony is admissible to prove that growing crops may be severed from a transfer of real estate by deed. It is said that this question was involved in the recent case of *Cooper v. Kennedy*, 86 Neb. 119.

The petition is an ordinary petition in replevin, and states conclusions sufficient, when accompanied by the statutory affidavit, to justify the issuance of the writ of replevin, but the pleadings which come after the petition, and which modify it, attempt to detail the facts upon which both the plaintiff and defendant rely, and they were construed together by the district court when it sustained the motion, and the question submitted to this court is whether the construction adopted by the district court is right. The statement in reply, which admits the allegations in the answer concerning the making of a written contract for the purchase of the land by the defendant from the plaintiff and others upon which the wheat in controversy was grown, and that the owners of the land after the execution of the contract executed and delivered a deed to said land to the defendant whereby said land was conveyed to the defendant, and that there was no special reservation of the said wheat in controversy contained in said contract or said deed, but that said wheat was specially reserved by the plaintiff and the owners of said land by parol, both at the time the contract of purchase and the deed were executed and delivered, and that the defendant agreed at said times that said wheat should be reserved to the plaintiff, states a good cause of action if it stood alone; but, unfortunately,

that statement does not stand alone, but is immediately coupled, with and followed by the statement that the defendant agreed that he would settle with the plaintiff for such wheat. If he did, then it is the duty of the defendant to settle with the plaintiff for the wheat by paying him for it, but the wheat itself belongs to the defendant. The defendant owns the wheat, but he owes the plaintiff for it, although it does not appear how much, all of which leaves an uncertainty in the mind concerning the truth of any fact claimed to be agreed upon between the plaintiff and defendant. This uncertainty is further increased by the next statement, that the plaintiff told a third party who was transacting the business of the sale that the wheat must be reserved to him (the plaintiff), but that said third party by mistake failed to put the reservation in the contract and deed. This is followed by still another statement to the effect that the plaintiff delivered possession of the land, with the understanding and agreement that he was to be paid for his wheat or that he could harvest the same. As the plaintiff did not harvest the wheat, he seems to have elected that he would be paid for it. In that event the defendant would seem to owe the plaintiff for the wheat, and the plaintiff might bring his action against the defendant for the value of the wheat, but certainly not for the possession of the wheat itself.

While the plaintiff would have the right to prove that the reservation of the wheat was made by parol (under the opinion in *Cooper v. Kennedy*, 86 Neb. 119), this does not excuse him from stating a cause of action, and this he seems to have failed to do. He started with an action of replevin. Of necessity that action depended upon his right of ownership and possession. He is obliged to stay with his original action as he started out with it. He cannot exchange it for some other form of action. "The ultimate question to be determined in a civil action is, whether the public force shall be used in behalf of one party to compel some act or forbearance on the part of the other; that is, whether one party has a right of action

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against the other, and at every stage of the action, whatever the state of the pleadings, an inquiry whether the pleadings, as they stand, will warrant such interposition is both pertinent and impending." Phillips, Code Pleading, sec. 35. "A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied upon." Phillips, Code Pleading, sec. 354. *First Nat. Bank v. Root*, 107 Ind. 224. The plaintiff should be required to state specifically what he denies. *Williams v. Evans*, 6 Neb. 216. One will not be allowed to plead inconsistent defenses. *Shellenbarger v. Biser*, 5 Neb. 195; *School District No. 27 v. Holmes*, 16 Neb. 486; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803; *Oakes v. Ziemer*, 61 Neb. 6. It would seem that the reply should be consistent with the petition. It is not.

The question is not presented as to whether the plaintiff could replevin a two-thirds interest in 30 acres of wheat in the shock or stack, and we do not decide it.

The motion for judgment was properly sustained by the district court.

AFFIRMED.

WALTER O. SHULTS, APPELLEE, V. CHICAGO, BURLINGTON
& QUINCY RAILWAY COMPANY, APPELLANT.

FILED MAY 29, 1912. No. 17,132.

1. **Railroads: LICENSEE: DUTY OF LICENSOR.** "Where one enters upon the premises of another with his consent, but without any invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768, followed and approved.
2. **Appeal: REVERSAL.** The evidence in this case examined, and found not to be materially different from that taken at the former trial.
• *Shulta v. Chicago, B. & Q. R. Co.*, 83 Neb. 272. The principle

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therein announced that the plaintiff is a bare licensee, and that the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants, is declared to be applicable to this case and requires the reversal of the judgment of the district court.

3. **Railroads: INJURY TO LICENSEE: LIABILITY OF LICENSOR.** Where the plaintiff, without the knowledge of the train crew, but with the knowledge and consent of the yardmaster of the defendant railroad company, went upon the freight yards of said company in the night time, and while he was there entered one of its emigrant cars for private business of his own with the occupants thereof, who were moving from one Nebraska town to another, was injured during the time that the said car was being weighed and switched in the usual manner, *held*, that he was a bare licensee, and that the defendant railroad company owed him no duty as long as no wanton or wilful injury was inflicted upon him by the servants of the company.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

James E. Kelby and Byron Clark, for appellant.

Shepherd & Ripley, contra.

HAMER, J.

As damages for a personal injury, the plaintiff recovered a judgment in the district court for Lancaster county against the Chicago, Burlington & Quincy Railway Company for \$1,000 and costs. The railroad company has appealed. This is the second appeal. *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, contains the opinion of this court on the former appeal.

On private business of his own, the plaintiff went down into the freight yards of the defendant railroad company at Lincoln on February 28, 1906, and visited his two cousins, named Kimball, who were moving from Palmyra, Nebraska, to York, Nebraska, in an emigrant car. In one end of their car they had furniture and in the other end of the car they had five horses and three mules. They had attempted to build a fence about the horses and

mules. The horses and mules were in the south end of the car. They stood crosswise in the car, and were tied up to the side of it. There was a partition between the horses and mules and the empty space which was between the two doors of the car. When the plaintiff reached the car he found his cousins occupying this space. The plaintiff seems to have noticed the partition, and he remarked to one of his cousins that "if he was going to sleep there it should be pretty solid, because if they chugged the car the car might accidentally throw them (the horses and mules) on him." When the plaintiff was going down to the freight yard where his cousins were, the testimony shows that the yardmaster told him that the particular car in which his cousins were had not been weighed yet, that it was on the "6X" track. The "6X" track was the "scale track." There is testimony that the yardmaster told him that it was a dangerous place for any one to be wandering about. It was between 8 and 9 o'clock, and a dark night. The plaintiff says it was a dangerous place to go at night. He was shown the way to the car and got into it. It stood in the yards which were used exclusively for the business of the railroad company, and it was on the scale track in a string of cars which were being weighed. The members of the train crew testified at the trial that, while handling and weighing the cars which caused the injury, the work was done in the usual manner, and that no greater speed and no more bumping of cars occurred than was usual when the cars were being weighed. While it is contended by counsel for the railroad company that the public were not permitted to go to this yard, it is in evidence that there was no fence around the part of the yard where the car stood and where the injury occurred, and there were occasional passengers who got on and off of some of the freight trains that stopped in that neighborhood; and there was a small lunch counter in the vicinity, where the employees of the railroad company and a few passengers who rode on a part of the freight trains ate their meals. The conductor

or other employees of the railroad company directed such passengers as came there on trains to the foot of the stairway which led out of the freight yards to the top of the "O" street viaduct. The locality was not so much frequented by passengers or by the public that the employees operating the defendant's trains and switch engines could reasonably expect some one to be there at any time. There is no evidence that passengers boarded the train or left it while it was standing on the scale track, and that track was used expressly by the company and for the purpose of weighing freight cars and switching them. It is common knowledge that it requires no great jolt to throw horses and mules off their feet when they are confined in a freight car, and if the partition was only constructed of pine boards or pine lumber, as seems to be shown by the evidence, then it would be crushed and broken to pieces if the horses and mules, or a part of them, fell against it or fell down upon it, and the plaintiff in such event would quite likely be injured, although the employees of the defendant might exercise reasonable care.

The plaintiff had been in the car only 15 or 20 minutes when the accident happened that resulted in his injury. He testified that he did not know whether the car stood on the scale track or not. He also testified that he was uncertain whether the jolt came from an engine or from another car. It is uncertain whether the particular car was driven against another. When the jolt came the partition between the horses and mules and the empty space was broken down, and one of the mules fell "square on the side" and on top of the plaintiff. The plaintiff seems to have been injured and was not able to go to work at his old employment.

The injury occurred in the freight yards of the company near the viaduct on "O" street. It seems that the jolt occurred while the railroad people were weighing their cars. They would take the car up on to a "hump" in the track $3\frac{1}{2}$ feet high, or a little more, the car would

be let down, and would run across automatic scales which weighed the car as it went across. The cars seem to have been bumped together for the purpose of coupling them, but it is uncertain just how the injury occurred. The car in question seems to have received the customary "bump," or was bumped against another car. The safety of the plaintiff depended upon the force of the "bump" and whether the partition was strong enough to resist such force. The plaintiff was familiar with the yards. He knew where the switch shanty, the scale track and the scales were. When the plaintiff went into the freight yards and entered the car with his cousins, he knew that he was taking some risk, because he knew that he was in a car where there were 5 horses and 3 mules, and that if the fence broke by reason of a car or an engine coming in contact with the car that he occupied, or because the car he occupied came in contact with another, then the mules and horses might be precipitated upon him unless the partition was strong enough to sustain their weight. He saw the partition and knew it was made of pine.

The plaintiff testified that there were cars on the track on each side of this car, that is, both north and south of it. The testimony of William G. Kimball, one of the cousins, is to the effect that there were cars both to the north and south of this car, and coupled to it. He does not know whether there was an engine on it at either end or not. He testified that he and his brother built the partition out of pine lumber. He does not describe this partition in detail. It may have been a flimsy affair and without much power of resistance. Marthenson, one of the switchmen, testified, as shown by the abstract: "The pieces of the partition in the car, I took out; they were broken all to pieces. The fiber of the lumber was not strong; it was pine lumber." From this statement it would seem that the lumber was brittle, easily broken, and probably had very little power of resistance.

E. J. Spratt testified: "I remember handling four or

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five emigrant cars, and I believe they said a man got hurt in one of them. I remember one of the cars we had been handling was taken back to the yard office in order to take the man out; that was one of the string that we had been handling, yes, sir, just before that. Just before they came to take the car to the yard office we had been running them over the bump, the scale track, over the scales. I was car catcher—got on top of them to hold them, with brakes; after they had been cut off from the engine and came over the scales; I got them and held them as near as I could a car or two lengths from the scales; I cannot just say how many were in that string, something like 15 or 16 cars. The engine was south of the scales and the cars were north of the engine. Johnnie Ferguson was cutting them off before they went to the scales.” This witness testified: “In letting that car over the scales and down to the incline there was no unusual movement of the car. I don’t think we had to bump it any more than the rest; we had to bump it to make the coupling. The car, after it gets weighed, runs about two car-lengths before it hits the others. The car has to go across the scales slowly. I rode the first car down and held it and let the rest couple on. The ordinary method, the usual, everyday method of doing that was just as we did it. I had been doing that for some time, had been working in the yards of nights for four years.”

John Johnson testified: “I remember the occasion of a man, Mr. Shults, getting hurt in the yards there in one of the cars about that time. * * * I know about the car being taken out of the string we had been handling. We had just weighed them. The engine was south of the scales, the cars north from the engine. We had about 15 or 18 cars. The engine pushed the car slowly up the incline and then the car was cut loose and weighed. * * * After they pass over the scale a man gets on top of the first one that goes over and sets the brake and keeps them moving. You know you let them run about a car-length from the scales and then stop them until the next car

comes along down; they bump against each other as they come down off the scales in order to couple them together, and then extend on down north on the track.

* * * The whole string, including the emigrant cars, were let down over the scales that night slow in order to weigh them. You can't let them go fast over the scales because they won't weigh. There was no one of the cars that went down over the scales fast that night that I remember of. They come together with a bump after they go over the scales in order to couple them. From the time they are let loose until they bump another car is about two car-lengths or three car-lengths. They do not go over the scales fast. There was no time that evening when the engine pushed a car over and forced it against the others. After we got through weighing we took the engine and coupled onto them. After the whole string is weighed we throw the switch and go down with the engine, couple them up, and pull them back past the scales. We left them on the side track. I had five or six cars of emigrants."

He went into the yards after he had been warned that there was danger. He knew the conditions by which he was surrounded. He knew that the car was yet to be weighed. He saw the partition that separated the horses and mules from him and from the place he was compelled to occupy, and he must have known that he was more or less in danger because the partition was likely to be broken down by the horses and mules, or a part of them, falling against it or upon it, if another car or an engine should strike this particular car, or if this car should be struck by another. He saw the fence and had an opportunity to estimate its strength when he looked at it, and knew it might be broken down. It was necessary to use some force to couple the cars together. In any event that is the way the employees of the company did the work. The railroad company had no contract of any kind with the plaintiff. He was not in their employ. They were not carrying him as a passenger. Was the railroad com-

pany bound to handle the car in which the plaintiff was visiting his cousins in any manner, different from the other cars which they were weighing? The other cars were taken up to the top of the "hump" on the "scale track," and they were then passed slowly down over the automatic scales so that they might be weighed as they passed over them. They would run a short distance below the "hump." Then each car was "bumped" into from time to time as the cars were coupled together, or it was bumped against another car. Was it the duty of this company to refrain from bumping this particular car because the plaintiff was in it? The plaintiff was hurt because he occupied an unsafe place after he had been warned of the danger and had observed and mentioned it, and while the company seem to have been handling their freight cars, including this particular one, in the usual way. There is no evidence that the train crew knew he was in the car at the time they weighed it.

The freight yards or switch yards, as they are some of the time designated, were not fenced. There was no way to prevent the public from going to the place where the car was found. The plaintiff went into the yards by the consent of the company's servants, and he was therefore not a trespasser. The car occupied was driven against another car, or another car was driven against it, so that the animals broke loose from their head fastenings and fell against the partition and broke it down, and so the plaintiff was injured.

The court said in the former case: "Viewed in the light most favorable to plaintiff, it (the testimony) establishes the fact that when he entered the yards of the defendant, and at the time he was injured, he was a bare licensee. He was not there as a passenger or servant, nor under any contractual relation with the defendant, but had been permitted to enter upon the premises for his own interest, convenience or gratification. In such a case the authorities substantially all say that the rule is well settled that an owner of premises owes to a licensee no duty as to the

condition of such premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or willingly cause him harm; that the licensee enters upon the premises at his own risk, and enjoys the license subject to its concomitant perils." In *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768, it is held: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants."

The evidence in this case seems to be almost identical with that taken at the former trial. We think that the principle announced by this court at the former hearing disposes of this case. The rule laid down at the former hearing and in *Chesley v. Rocheford & Gould*, *supra*, compels us to hold that the plaintiff was a licensee, and was entitled to such protection only as the company could conveniently give him under the circumstances, and without a special effort made on his behalf, and there was no negligence upon the part of the company unless it wilfully and needlessly caused the partition to be broken down by the application of excessive and unnecessary force in weighing or handling the car, and thereby caused the animals in it, or at least one of them, to fall upon the plaintiff. And of this there seems to be no evidence. The plaintiff voluntarily took the risk, and the evidence is insufficient to sustain the verdict rendered. The defendant moved for a directed verdict against the plaintiff. This motion should have been sustained.

The judgment of the district court is

REVERSED.

SEDGWICK, J., concurs in conclusion.

REESE, C. J., dissents.

Davies v. Davies.

ABRAHAM L. DAVIES, APPELLEE, v. CHARLES K. DAVIES,
APPELLANT.

FILED JUNE 12, 1912. No. 16,737.

Appeal: CONFLICTING EVIDENCE. Where a cause is submitted to a trial jury under the issues formed by the pleadings upon conflicting evidence, the verdict will not ordinarily be set aside.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

John A. Miller and Martin & Bockes, for appellant.

Frank E. Beeman, contra.

REESE, C. J.

This action was commenced in the county court of Buffalo county, where plaintiff sued for the sum of \$443.33. The cause was appealed to the district court, where a jury trial was had, resulting in a verdict in favor of plaintiff for \$375, from which the sum of \$15 was remitted, when judgment was rendered for \$360. Defendant appeals.

Plaintiff and defendant are brothers, and the apparent feeling of animosity existing between them is to be much deplored. The testimony of both was taken upon the trial and abounds in contradictions and disputes on almost every material element in the case. The petition is of considerable length, and cannot be set out here in full, but may be summarized as follows: That on June 23, 1908, plaintiff was employed by the Union Pacific Railroad Company at Columbus, and was receiving wages at \$50 a month, living in his own home, the same being paid for on the instalment plan, and in which his wife was keeping boarders, the same yielding an income sufficient to meet family expenses, while plaintiff's wages were devoted to paying the instalments due upon the home as

they matured; that defendant induced plaintiff to resign his employment, sell his home, and remove from Columbus to Kearney, by agreeing with plaintiff that if he would take care of defendant's dairy business in Kearney defendant would pay plaintiff the sum of \$45 a month, furnish two men to do the work, and furnish plaintiff with feed for such live stock as plaintiff might desire to purchase; that the \$45 a month should only be a part of the compensation to be received by plaintiff, and that if at the end of the year plaintiff had not made more than he was making at Columbus the defendant would pay plaintiff the difference; that, in pursuance of the contract, plaintiff sold his home in Columbus, surrendered his employment with the railroad company, sold his furniture in part, and removed his family and remaining furniture to Kearney at great expense, and took charge of defendant's dairy business, but that defendant failed to perform the conditions of his contract. The specifications of alleged failure are set out in some detail, but need not be here noticed. A statement of account is made by which it is claimed that there is \$443.33 due plaintiff, and for which judgment is prayed.

The answer contains a denial of the alleged contract, and alleges, in substance, that defendant hired plaintiff and agreed to pay him \$45 a month, and under the contract of hire plaintiff worked for defendant seven months and one day; that at the time of the hiring defendant told plaintiff that he would use his judgment in helping plaintiff buy some cows, and would go his security, not to exceed \$400, in the purchase of cows, to be used on defendant's place, and plaintiff might keep four milch cows thereon, and defendant would pay plaintiff \$4 a month for use of each of said cows, but that plaintiff failed to keep the same; that plaintiff did not purchase any cattle; that by a mutual contract thereafter made it was agreed that defendant should allow and pay plaintiff the sum of \$60 a month for his services, and that the same should be in lieu of all other obligations on the part of defendant

to plaintiff and which was to be in full compensation, all of which had been paid; that plaintiff quit the employment of defendant on his own motion and was fully paid to said time. The reply was a general denial.

The whole of the testimony has been read by us, and, while much of it is not convincing to the writer, and is in some respects quite unsatisfactory, yet as the evidence was submitted to the jury, whose duty it was to decide those questions of fact, we cannot interfere, the evidence being conflicting, and the witnesses, with one exception, having testified in their presence.

It is insisted that the averment in the answer that there was a change in the contract, that plaintiff agreed to accept the \$60 a month as full payment, and that the same was paid, was fully shown, not only by the evidence adduced by defendant, but by the testimony of plaintiff himself, and therefore the verdict is not sustained by the evidence, and the judgment should, for that reason, be reversed. This is true if the record clearly sustains the contention as to the state of proofs. We may assume that the testimony of defendant and his son support the claim of counsel, and yet, under the evidence, the question was for solution alone by the jury. The testimony of plaintiff does not coincide with that of defendant. It is true he accepted the increase of his wages to \$60 a month, and that he testified that he received it under protest, but he nowhere admits that he received it in full satisfaction of his claims. He was called in rebuttal and interrogated as to the testimony of defendant and his son upon this point, and testified that in the conversation referred to "there was nothing said about \$60, or about the change in the contract, or whether I was satisfied or not." He gave other testimony of quite similar import, and, there being a conflict, the matter was for the jury to decide. While the case is one in which, had we been the triers of fact, we might have come to a somewhat different conclusion, the whole case was submitted to the jury under proper in-

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structions, and we do not see that we are called upon to interfere with the verdict.

The judgment of the district court is

AFFIRMED.

ALFRED BOLING V. STATE OF NEBRASKA.

FILED JUNE 12, 1912. No. 17,469.

1. **Rape: CORROBORATIVE EVIDENCE.** "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State*, 83 Neb. 226.
2. ———: ———. The unsupported testimony of a prosecutrix that the crime with which a defendant is charged was repeated subsequent to the alleged commission of the principal offense is not corroborative of the testimony of the prosecutrix as to the commission of the offense charged.
3. ———: **EVIDENCE: ADMISSIBILITY.** Corroboration of the testimony of the prosecutrix, as to the commission of the crime charged, on May 6, 1911, was furnished by the testimony of her sister, a young woman 20 years of age. *Held*, That the letter referred to in the opinion, written by the older sister to the defendant more than one month after the time when, as testified by her, the crime was committed upon her younger sister in her presence, was proper evidence to go to the jury upon the question of the credibility of the writer of such letter, and its exclusion was prejudicial error.
4. **Marriage: EVIDENCE.** Marriage may be proved by the oral testimony of those who were present, including the parties thereto. If such proof is necessary, it is not required that the record of the issuance of the license and of the marriage be produced.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

Lambert & McCarty, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

REESE, C. J.

Plaintiff in error, whom we will hereafter refer to as defendant, was prosecuted in the district court for the crime of rape upon the person of one Dollie Hager, a female child under the age of 15 years; defendant being over 18 years of age. The jury returned a verdict of guilty, and he was sentenced to the penitentiary for a term of six years. He prosecutes error to this court.

The case is a most peculiar one, and perhaps there is no other like it. Defendant and Dollie Hager are first cousins. At the time of the alleged rape, she was between 13 and 14 years of age. There seems to have been a strong attachment between them. A short time preceding the night of the alleged rape, defendant proposed marriage to Dollie, and was met by the answer that she was too young to marry. The day before the alleged rape, they drove to the home of an uncle and aunt of Dollie, and remained there all night. An elder sister of Dollie, who was about 20 years of age, was at the home of the aunt when they arrived, and the three remained there. Two bedrooms are referred to in the evidence, one of which was occupied during the night by the uncle and aunt. In the other there were two beds, one of which was occupied by the two girls, and the other by defendant and two young men or boys of the ages of 15 and 17, members of the family. The night was stormy, with rain, lightning and thunder. The elder sister occupied the front side of the bed in which the girls slept, with Dollie in the rear side next to the partition between that room and the one occupied by the uncle and aunt. The aunt was ill, and the elder sister had been with the family for some days assisting in her care and the care of the household. It was testified by both girls that during the night defendant left the bed where he was sleeping, passed over the elder sister near the foot of the bed, placed himself between the two girls, and committed the crime on the younger girl, the elder being awake during the whole time and

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knowing and realizing the full purport of his act, but making no objections and offering no protest; that he returned to his bed and remained until morning, but no reference was had to what it is said had occurred. That afternoon, with the knowledge of the elder sister, the defendant and Dollie returned to her home, and she testified that the intercourse was repeated there, none of the family being at home. All intercourse prior to a subsequent marriage in Kansas was denied by the defendant in his testimony, and no testimony was offered to prove any such intercourse in this state after the marriage. After their return to Dollie's home, they went to a neighbor's where Dollie's mother was, and returned to the home with her. Some two weeks thereafter defendant, with the knowledge and consent of the family, including the elder sister, started with Dollie to Kansas City, where his mother, who was the aunt of Dollie, resided. When they arrived at the city of Atchison, Kansas, they stopped, put up for the night at a hotel, being assigned separate rooms, and the next day they were married, the age of Dollie being misrepresented in order to obtain the license and marriage. They then went on to Kansas City, where they remained for a time with defendant's mother. He returned to Nebraska and to the family. Dollie was taken sick with appendicitis, and on her return home was taken to Omaha, where an operation for that disease was performed upon her. After defendant's return he informed the mother of Dollie of their marriage, but she objected to the marriage and forbade defendant's presence at her home. Soon thereafter the elder sister reported what is alleged to have occurred, and defendant's arrest and conviction followed.

It is not our purpose to discuss the evidence, nor to unnecessarily cast any reflections upon any witness, and therefore the evidence will not be considered, except so far as may be necessary in the disposition of the alleged errors which are presented.

Under the law of both Nebraska and Kansas the mar-

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riage is void on account of the relationship between the parties. The charge contained in the information is as to the act said to have been committed at the home of the uncle and aunt when the bed was occupied by the two girls. During the trial Dollie was asked if defendant had intercourse with her at any other time about the date of the act referred to, and, over the objection of defendant, was allowed to testify that on the next evening upon their return to her home the act was repeated within the kitchen, no one else being at home. This evidence was admitted as corroborative evidence tending to corroborate the evidence as to the bed assault, which had been testified to by both the prosecutrix and her elder sister. The court also by two instructions instructed the jury to the same effect. This action is assigned as error. Under the rule stated in *Woodruff v. State*, 72 Neb. 815, and *Lee-dom v. State*, 81 Neb. 585, proof of the commission of the other offense, by competent testimony, is admissible. We do not wish to be understood as holding otherwise; no thought of doing so. But the question here is: Is the unsupported testimony of the prosecutrix of other criminal acts competent as corroborative evidence? In other words, can the uncorroborated evidence of other offenses, testified to by the prosecutrix alone, corroborate her testimony as to the principal fact? Can she by her unsupported testimony corroborate herself?

In *Mott v. State*, 83 Neb. 226, which was a case similar to this, it is said at page 230: "As to the nature of the corroboration necessary to sustain a conviction in such cases, the authorities seem quite clear. Where the law requires the corroboration of a witness, it must be accompanied by other evidence than that of the witness himself. His own acts or statements do not constitute corroborative evidence. *State v. Kingsley*, 39 Ia. 439; *State v. Lenihan*, 88 Ia. 670; *State v. McGinn*, 109 Ia. 641. Facts, whether main or collateral, must be established by competent testimony before they become of probative force in a lawsuit; and it is self-evident that the main fact in

this case cannot be strengthened by a collateral fact, the existence of which is dependent upon the same class of testimony."

In *Mills v. Commonwealth*, 93 Va. 815, which was a prosecution for seduction, in discussing the essentials of corroborating testimony in such cases, it is said: "It is sufficient here to say that it must be evidence which does not emanate from the mouth of the seduced female; that it must not rest wholly upon her credibility, but must be such evidence as adds to, strengthens, confirms, and corroborates her."

As we have seen, the elder sister testified that she was in the bed with the prosecutrix; that defendant got in bed between them; that with her knowledge of every act performed, including defendant's preparation for the crime—in removing or pulling up the nightgown—to the completion of the gratification of his desires and remaining for a time in the bed between them, she made no effort to prevent the act, nor in any way to protect her younger sister; that she refrained from reporting the facts that night or the next day and for a comparatively long time thereafter; that she allowed defendant to take the sister home—a distance of some eight miles; that she offered no objection or protest to her accompanying him to Kansas City; and that she said nothing about the alleged occurrence until after she learned of the marriage.

As a part of her cross-examination she identified a letter written to defendant, signed by her, and mailed to him after the marriage, but before she knew of the fact. The letter was offered in evidence at various stages of the trial, both as a part of the cross-examination and in support of the defense, but, upon objection of the state, it was excluded. It abounded in expressions of affection and the use of endearing terms. It need not be here set out in full. At the close she says: "I think of you in daytime, I dream of you at night. I am wearing my heart away for you Alford dear. Well, I will close for this time. Hoping to hear from you soon. Yours sincere. With love and kisses. Answer soon." (Signed.)

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This letter should have been received in evidence for the consideration of the jury in arriving at the weight to be given to her testimony. The criminal act is charged to have been committed on the 6th day of May, 1911, and the letter was written and dated June 19, following. If the testimony of herself and Dollie is true, she knew at the time of writing the letter that defendant had polluted and debauched her sister. It was for the jury to say whether with that knowledge and the recollection of the event on her mind she would have written such a letter. The fact of writing and sending the letter is not conclusive of the falsity of her testimony, nor do we say, as a matter of law, that it should impair its weight, but it should have been submitted to the jury for such consideration as affecting her testimony as they might see proper to give it.

Copies of the records of the county judge of Atchison county, Kansas, showing the issuance of the marriage license and the marriage of defendant and Dollie Hager were offered and received in evidence over the objection of defendant, and of which he complains. While the evidence is, ordinarily, deemed competent, and in some instances essential to prove marriage, yet the subject is not entitled to serious consideration here. It was not essential to the proof of the marriage, for the fact was testified to and admitted by defendant on more than one occasion. The admission of the documents was not necessary. Moreover, the fact of the marriage was not an essential element of the state's case. That the act charged occurred at or about the time alleged, the ages of the parties being proved, and that it was committed within the jurisdiction of the court, constituted the essence of the case. Neither the record of the marriage, nor the copy of the law of Kansas declaring the marriage of first cousins void and incestuous, could do more than incumber the record.

Other alleged errors are assigned, but which it is not deemed necessary to notice, as they may not occur upon a subsequent trial.

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For the error in instructing the jury that the evidence of the complaining witness of other acts of intercourse corroborated her testimony as to the act charged, and the exclusion of the letter referred to, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

ROSE, J., dissenting.

I am fully convinced that the jury in this case arrived at their verdict through the consideration of competent testimony alone, and that it can safely be said, in the light of the entire record, that the result would have been exactly the same had the trial court, in every particular, ruled according to the suggestions of the majority in the opinion. The jury voluntarily recommended the shortest sentence authorized by law for the felony charged and were not prejudiced against defendant. In my opinion, the conviction should not be set aside for any reason given by the majority.

BOB WILLIAMS V. STATE OF NEBRASKA.

FILED JUNE 12, 1912. No. 17,509.

1. Criminal Law: PRINCIPALS. Where one is personally present at the time of the commission of an offense, under such circumstances as to leave no doubt that his purpose was to participate in the act should occasion require, he should be held as a principal in the crime.
2. Robbery: EVIDENCE. The evidence is examined, the facts set out in the opinion, and *held* sufficient to warrant a verdict of guilty.
3. Criminal Law: INDETERMINATE SENTENCE ACT: CONSTITUTIONALITY. The indeterminate sentence law of this state is not unconstitutional.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Charles Haffke, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

REESE, C. J.

An information was filed in the district court accusing plaintiff in error of the crime of robbery, the charge being that he robbed one Earl W. Spencer of the sum of \$17.60 by an assault and putting him in fear of bodily violence. A jury trial was had, which resulted in a verdict finding plaintiff in error guilty, and he was sentenced to the indeterminate term of from three years to fifteen years in the penitentiary. He brings the cause to this court for review by proceedings in error.

There are three principal errors assigned: First, that the evidence is insufficient to sustain the verdict; second, that the court erred in instructions; and, third, that the law providing for the indeterminate sentence is unconstitutional and void, and, if sentenced at all, the judgment should have been for a fixed and determined length of time.

As to the first contention, there is practically no conflict in the evidence. The alleged facts as to the robbery and the presence of plaintiff in error, whom we will hereafter refer to as defendant, at the scene of the commission of the offense is not denied. The crime was committed after midnight, or early morning, of December 2, 1911. The person robbed was the toll-gate keeper at the west end of the bridge for general travel across the Missouri river in the city of Omaha. From the undisputed evidence it appears that defendant boarded a street car on the Iowa side and was transported to Omaha, arriving at the west end of the bridge about the hour of 1 o'clock and 30 minutes on the morning of the robbery, which occurred at about 20 minutes after 2. When the car reached Eleventh street, which is the second street west

of the west end of the bridge, he left the car. Another man, who is referred to in the evidence as "the white man," left the car at the same time, both going in the same direction. At about 20 minutes after 2 o'clock a white man and defendant went to the toll-house, situated near the west end of the bridge, when the white man presented the muzzle of a pistol toward Spencer, the toll-keeper, and compelled him to give him the money. Defendant was standing by, but said nothing, nor did he make any demonstration of any kind. After the robbery had been completed, the money all having been placed in the white man's pocket, he ordered defendant to go home, and compelled Spencer to go down a flight of steps to the railroad track below. They went down the steps, defendant in front, Spencer following, and the white man in the rear with his drawn pistol. When they arrived at the foot of the stairway, Spencer was ordered to go south along the tracks. He started to walk, but was ordered to run, which he did for some distance. He looked back and saw both men running toward the north, when they soon disappeared in or around a lumber yard. The evidence is clear enough as to the presence of defendant in the car coming from the Council Bluffs side of the river, and as to his presence with the other man at the scene of the robbery. The contention is that, as he took no active part in the robbing of Spencer, he should not be held guilty of the crime. It is true that mere presence is not always conclusive of participation in the acts of others. And if it be shown that such presence was by compulsion, or merely incidental, the presumption of participation, should such presumption arise, would be rebutted. But no explanation of the kind was offered. Moreover, the fact that defendant led the way down the steps and ran away with the principal actor in the despoiling of Spencer would seem to strongly indicate that there was more than an incidental meeting of the two. Defendant had come from across the river, and left the car some distance west of the bridge. The return of that car was the last

one to leave Omaha for Council Bluffs that night. There is no suggestion that the toll-house was in the line of travel to his lodging place. He did not cross the bridge to the east. He made no move to protect Spencer, nor to dissuade his associate from the commission of the crime. He was passive during the time of the robbery, possibly because his services were not needed, no resistance being made. These facts, unexplained as they were, would be sufficient to convince any reasonable mind that there was a common design between the two, and each carried out his part. The verdict cannot be molested as not sustained by the evidence. It is not essential that defendant should have taken any active part in the robbery. If he were personally present under such circumstances as to show that he was a participant in the offense, that would be sufficient to constitute him a principal. *Hill v. State*, 42 Neb. 503; *Dixon v. State*, 46 Neb. 298.

It was upon this theory that the instructions of the court were given, and it is not deemed necessary to extend this opinion by copying them here. We have examined them, and are unable to detect any prejudicial error in that regard.

The question of the constitutionality of the indeterminate sentence law was fully passed upon in *Wallace v. State*, ante, p. 158; the opinion having been filed since the preparation of defendant's brief. We have re-examined that opinion, and are satisfied with it. We have no doubt of the constitutionality of the law. The question was before the supreme court of the United States in *Ughbanks v. Armstrong*, 208 U. S. 481, and the decisions of the state courts in the cases cited in *Wallace v. State*, supra, were approved. The only difference between the holdings of those decisions and the views of the writer hereof would be as to the construction to be given to the language of the act. It is provided: "The court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less

than the minimum term provided by law," etc. Criminal code, sec. 502a. Had it not been for the holdings on practically similar statutes, that they deprived the trial courts of all discretion, we would not hesitate to hold that, while the court may not fix the limit or duration of the sentence, as under the prior law, yet this language does not prevent the fixing of an indeterminate sentence within the statutory limits. A sufficient illustration of this may be found in two cases of *Lukehart v. State*, ante, p. 219, and *Lambert v. State*, ante, p. 520, recently decided by this court. Those men were accused of receiving stolen property. The value of the property was found in one case to be \$35.50, and in the other \$36. The statute provides imprisonment of from one to seven years as the penalty for receiving stolen goods of the value of \$35 or upwards. In each case the sentence is for that indeterminate term. Were the parties strangers and without friends who would become interested in their behalf, they might remain in prison for the full seven years. A cruel and unjust punishment, and yet beyond the power of the court to afford them justice, while no greater punishment would be imposed upon one who had received stolen property of the value of thousands of dollars. If permitted, the court might have imposed an indeterminate sentence commensurate with the offense, and yet, I believe, have been strictly within the letter and spirit of the law. We are, probably, bound by the many decisions of the high courts of the country, and the only power which can correct the evil is the legislature. We can see no objection to the constitutionality of the law, but cannot give our unqualified approval to the construction placed upon it.

It follows that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

LERTON, J., concurring in part.

I cannot agree with the criticism made of the decisions of other courts. Under the statutory provisions, in my

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judgment the holdings cannot logically be otherwise. I trust, however, that the legislature will remedy the obvious defect in the statute which permits the possibility of an unlearned or penniless convict remaining confined for the maximum term for the sole reason that he is unable to prepare and present for himself an application for release at an earlier time or to employ counsel for that purpose.

CHARLES E. HILL, APPELLEE, V. WAITER A. CHAMBERLAIN
ET AL., APPELLANTS.

FILED JUNE 12, 1912. No. 16,720.

1. **Taxation: FORECLOSURE SALE: SUIT TO SET ASIDE DEED: PLEADING.**
In an action to set aside a sheriff's deed executed upon a sale under a void decree foreclosing a tax lien, an allegation that the plaintiff is the owner of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer.
2. **Quieting Title: LIMITATIONS.** Where the lands of a resident of the state are sold under a decree entered against him on service by publication, no appearance in the action being made by or on behalf of such party, an action to quiet his title to the land may be brought at any time within ten years from the recording of the deed made on a sale under the decree or taking possession thereunder. *Payne v. Anderson*, 80 Neb. 216.
3. ———: **TAXATION: EQUITY.** In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any lien for taxes paid is a sufficient offer to do equity, and, if the right to redeem is contested, is a sufficient tender of any taxes due the defendants.
4. **Evidence examined, and held sufficient to sustain the decree of the district court.**

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland, for appellants.

J. G. Beeler and George E. French, contra.

BARNES, J.

Action in the district court for Lincoln county to quiet title to the southeast quarter of section 2, township 9 north, of range 34 west of the 6th P. M., situated in that county. The plaintiff had the judgment, and the defendants have appealed.

It appears that on the 25th day of June, 1900, the county of Lincoln commenced an action to foreclose its lien for taxes on the land in question without administrative sale, and obtained a decree of foreclosure; that the land was thereafter sold to satisfy the decree, and a sheriff's deed therefor was executed to the county on the 18th day of December, 1901; that the county thereafter conveyed the premises to one W. A. Chamberlain, who on the 3d day of December, 1903, conveyed the same to the defendant Elizabeth Chamberlain, who took possession thereof some time in the year 1905, and has since occupied the land for agricultural purposes only; that in the tax foreclosure proceedings service was had upon the plaintiff as owner of the land by publication only; that at that time he was a *bona fide* resident of Adams county in this state, and for that reason the trial court found and decreed that the tax foreclosure proceedings were void, and rendered a judgment permitting the plaintiff to redeem his land from the lien for taxes by his payment into court for defendants' use and benefit the sum of \$364, which was the amount of all taxes against the land, including interest, penalties and costs, which had been paid by the defendants and their grantors. It further appears that the decree gave plaintiff nothing for rents and profits, and no allowance was made to the defendants for permanent improvements.

Defendants contend that the court erred in overruling

their demurrer to the plaintiff's petition, by which it was alleged that plaintiff is the owner of the land (describing it); and it is argued that this allegation was merely a conclusion of law, and was insufficient to sustain the action. That question seems to have been settled in *Harrington v. Hayes County*, 81 Neb. 231, where it was said: "In an action to set aside a sheriff's deed upon the ground that the order confirming the sale which it was executed to carry out was made by the judge disqualified to act, an allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer." The rule thus announced seems to be supported by 31 Cyc. 61; *Johnson v. Vance*, 86 Cal. 128; *O'Keefe v. Cannon*, 52 Fed. 898; *George Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641; and *Ingram v. Wishkah Boom Co.*, 35 Wash. 191. We are therefore of opinion that this contention is not well founded.

Defendants also contend that the action was barred by the limitation contained in sections 11129, 11186, Ann. St. 1909. This court has already adjudicated that question in *Payne v. Anderson*, 80 Neb. 216, where it was said: "Where the lands of a resident of the state are sold under a decree entered against him on service by publication, no appearance in the action being made by or on behalf of such party, an action to quiet his title to the land may be brought at any time within ten years from the recording of the deed made on a sale under the decree."

It is further contended by the defendants that the pleadings and proof are not sufficient to sustain the decree, and it is argued that it should have been alleged and proved that all taxes due upon the property had been paid by the plaintiff or by the persons under whom he claimed. In *Payne v. Anderson, supra*, it was said: "In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any

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lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendants."

Finally, it is contended that the court erred in failing to allow the defendants anything on account of permanent improvements, and it is argued that the testimony shows that defendants broke 120 acres of the land in question, for which they should receive the sum of \$270, with interest from the year 1905. An examination of the record discloses that at the time defendants took possession of the land 120 acres of it had been broken and previously farmed; that they disced the land, or rather listed it to corn. This testimony falls so far short of establishing the plaintiff's contention that we think the district court did not err in refusing to allow them anything for permanent improvements.

As we view the case, every question presented by the record has been determined adversely to the defendants by the former decisions of this court. Therefore, the judgment of the district court is

AFFIRMED.

HENRY DHOOGHE, APPELLANT, V. CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY, APPELLEE.

FILED JUNE 12, 1912. No. 16,729.

1. **Venue: ACTION FOR INJURY TO LAND.** An action for damages caused by flooding a tract of land upon which a brick-kiln is maintained, together with bricks in the process of being manufactured thereon, by the improper and negligent construction of a railroad track, is an action for an injury to real estate, which must have been brought in the county where the land was situated, if commenced before the 1911 amendment to section 51 of the code took effect.
2. ———: **OBJECTION TO JURISDICTION: DISMISSAL.** Where such action is brought in the wrong county, objection to the jurisdiction of the court over the subject matter may be interposed at any time before trial; and, where such objection is seasonably inter-

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posed, it is proper for the court to dismiss the action without prejudice.

3. **Dismissal:** REVIEW. In order to predicate error for such dismissal on the ground that some of the property destroyed was personal property, it was incumbent upon the plaintiff to request the court to docket a separate cause of action for the recovery of such damages.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Bartos & Bartos and Hall, Woods & Bishop, for appellant.

M. A. Low, Grimm & Grimm and Hazlett & Jack, contra.

BARNES, J.

Action in the district court for Saline county for damages to plaintiff's brick-yard situated in Gage county. On defendant's objection to the jurisdiction of the court over the subject matter of the suit, the action was dismissed without prejudice, and the plaintiff has appealed.

At the time when this action was commenced section 51 of the code contained a provision as follows: "All actions to recover damages for any trespass upon or any injury to real estate, shall be brought only in the county where such real estate is situated." The main question presented for our consideration is: Was this an action for injury or damage to real estate, and local in kind; or was it one for damages to personal property, and therefore of a transitory nature.

The petition contained but one count, in which it was alleged, in substance, that plaintiff was the owner of $4\frac{3}{4}$ acres of land situated in Gage county, Nebraska, which was used by him as a brick-yard, upon which there was situated sheds, machinery, a brick-kiln, brick in process of being manufactured, lumber and wood of great value, of which he is now and has been the owner and possessor ever since the 2d day of December, 1895; that the defend-

ant owns and operates a line of railroad running from the northeast to the southwest across the section in which the plaintiff's land is situated, and other lands lying near thereto; that defendant constructed its roadbed and graded its track in a manner wholly inadequate to pass the volume of water which accumulated and flowed in Turkey creek and the old channel of the Blue river near plaintiff's land; that on and prior to July 9, 1902, plaintiff was engaged in the manufacture of brick on his said tract of land in Gage county, as above stated; and by reason of the careless, negligent and insufficient manner in which the defendant had dug its ditches, made its embankments, built its roadbed, culvert and bridge as aforesaid, a large body of water accumulated in said ditches and in said creek, and the old channel on the west side of said railroad track, and set back and overflowed the banks of said streams and flooded and submerged plaintiff's brick-yard with large quantities of water, and deposited thereon mud, sand, silt and debris, and thereby damaged and destroyed 60,000 brick in the kiln, of the value of \$390; 7,000 brick in sheds, of the value of \$35; 2,000 brick in the wall of the kiln, of the value of \$220; lumber, of the value of \$20; and wood, of the value of \$30, and damaged the said brick-yard and sheds in the sum of \$160; that, in order to resume work and carry on his business, plaintiff was compelled to remove from and clean the said premises of sand, mud and debris, and, in so doing, expended the sum of \$58; that he was deprived of the use of his premises, buildings, sheds, machinery and brick-kiln, and prevented from carrying on his business for several weeks, whereby he was damaged in the sum of \$200; that on or about the 28th day of May, 1903, plaintiff's premises were again flooded with water in like manner and from the same cause, as above stated, whereby his buildings, sheds, brick-yard, machinery and brick-kiln were damaged in the sum of \$50. Plaintiff prayed judgment for the aggregate sum of \$1,163, with interest from the 1st day of November, 1903. To this petition defend-

ant filed an answer, and at the commencement of the trial objected to the jurisdiction of the court over the subject matter of the action. The court found that the action was real and local in its nature, and therefore dismissed the plaintiff's action without prejudice.

From the foregoing it seems clear that most of the injuries for which the plaintiff sought to recover were to his land, and his brick-kiln and other permanent improvements situated thereon, and, with the exception of the destruction of wood valued at \$30, and lumber of the value of \$20, could not have occurred to the plaintiff at any other place than upon his land situated in Gage county. The distinction between transitory and local actions is that the former may have occurred anywhere, and those only are considered local where the cause of action or the injury could not have occurred elsewhere. This rule is well stated in *Livingston v. Jefferson*, 15 Fed. Cas. No. 8,411, 4 Am. Law J. 78; *Hill v. Nelson*, 70 N. J. Law, 376; *Doherty v. Catskill Cement Co.*, 72 N. J. Law, 315; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474. In *Howard v. Ingersoll*, 17 Ala. 780, it was held that an action for flooding lands with water is local, and cannot be maintained out of the jurisdiction in which the land is situated, if the act causing the damage was done in that jurisdiction.

From the foregoing authorities it seems clear that the main items for which the plaintiff sought to recover were for injuries to his real estate, and therefore the action should have been brought in Gage county, instead of Saline county, as provided by section 51 of the code. The fact that the legislature of 1911 amended that section to the extent of permitting an action of this nature to be brought in any county where service can be made upon the corporation is immaterial here, as this action was commenced prior to such amendment.

It is contended, however, that some of the property injured was personal property, and therefore the court erred in dismissing the plaintiff's action. In disposing

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on, it is sufficient to say that the petition cause of action, and the plaintiff made no allowed to docket a separate cause of action for damages to the two items of personal property mentioned therein. Therefore, he is in no position to complain of the judgment dismissing his action without prejudice.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

**ELMER PHILLIPS, APPELLER, V. CHICAGO & NORTHWESTERN
RAILWAY COMPANY, APPELLANT.**

FILED JUNE 12, 1912. No. 17,066.

1. **Appeal: REVIEW.** The verdict of a jury upon questions of fact properly submitted to them is final, unless the verdict is manifestly wrong.
2. **Railroads: INJURY TO LIVE STOCK: ACTION: EVIDENCE.** Evidence examined, its substance stated in the opinion, and held sufficient to warrant the trial court in refusing to direct the jury to return a verdict for the defendant.

APPEAL from the district court for Pierce county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Mapes & Hazen and B. H. Dunham, for appellant.

M. H. Leamy, contra.

BARNES, J.

Action in the district court for Pierce county to recover the value of a steer struck and injured by one of the defendant's locomotive engines. The plaintiff had the verdict and judgment, and the defendant has appealed.

The appellant contends that the evidence does not sustain the judgment, and therefore the district court erred

in refusing to direct the jury to return a verdict for the defendant.

It appears from the record that plaintiff's right of recovery depended upon the position of the animal when it was struck by the defendant's locomotive. On this question the evidence was conflicting. Mrs. Key, an apparently disinterested and truthful witness, testified that she was about 15 or 20 rods from the place where the animal was struck, and just a moment before that time she saw it on the railroad track and right of way just inside the cattle-guard. The engineer in charge of the locomotive testified that the animal at that time was on the public highway crossing just outside the cattle-guard. Other witnesses testified that the cattle-guard was insufficient to prevent live stock from getting upon the defendant's right of way. In fact the defendant's section foreman stated that he had seen cattle pass over the guard on the opposite side of the highway, which was constructed in the same manner as the one in question. A Mrs. Dutcher testified that she lived just across the road from the plaintiff's farm where the steer in question was killed; that she went to the door of her home just before the train whistled, and saw the steer standing on the highway by the cattle-guard just as if he was going to cross; that she went back into the house and heard the train whistle for something on the track; she immediately went to the door again and looked out in that direction; that the train had not yet crossed the highway; that she looked for the steer, but did not see him; that from the place and position where she was standing, at the time, she could see the steer if he was on the highway, and if he had passed over the cattle-guard and on to the right of way she could not see him. Some of the witnesses testified that they saw a single track apparently made by the animal a few feet inside of the cattle-guard, and it appears that the animal itself was found lying helpless upon the defendant's right of way about 75 feet from the inside of the guard.

Considering all of the testimony contained in the record, we are unable to say that the evidence was insufficient to sustain the verdict. While there are some features of the case from which we might have arrived at a different conclusion, still, considering all of the testimony, we cannot say that the verdict is not sustained by the evidence. The rule which requires a court of review to support a verdict and judgment based upon conflicting evidence, unless they are clearly wrong, constrains us to affirm the judgment in this case, which is accordingly done.

AFFIRMED.

VILLAGE OF KENESAW, APPELLEE, v. CHICAGO, BURLINGTON
& QUINCY RAILROAD COMPANY, APPELLANT.

FILED JUNE 12, 1912. No. 16,750.

1. **Nuisance: INJUNCTION: VILLAGES.** Under the corporate and general powers conferred by chapter 14, Comp. St. 1909, upon cities of the second class and villages, a village has the right to maintain an action in equity to enjoin the maintenance and continuance of a public nuisance.
2. ———: **ABATEMENT: INJUNCTION.** An injunction to prevent the maintenance of the necessary facilities for the loading of live stock by a common carrier will not be granted as a matter of right, but only when it is apparent that this duty may be carried on conveniently elsewhere, and that the evils complained of are substantial and cannot be otherwise remedied.
3. ———: ———: ———: **DECREE.** In an action to restrain a common carrier from maintaining stock-yards at a certain point within a village, it is not the duty of the court to fix the place to which they should be removed, and a decree which leaves the question of their future location to the defendant, outside of certain limits, is not so indefinite as to be erroneous and void.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Byron Clark, Frank E. Bishop and John C. Sterens, for appellant.

Tibbets, Morcy & Fuller, contra.

LETTON, J.

This is an action to enjoin the defendant railroad company from maintaining stock-yards at the place where they are now situated in the village of Kenesaw.

The trial court found that the stock-yards "are located in or near the center of said village of Kenesaw, in the thickly settled portion thereof; that they are adjacent to the main business street of said village and about 40 feet therefrom, the entrance to said yards, pens and inclosures being about 80 feet from said street; that the same are kept in as good a condition as they can be kept, considering the purposes for which they are necessarily used, by defendant as a common carrier by railroad of live stock; but that, by reason of the manure and the natural odors from the animals therein inclosed, there arises therefrom smells and stenches, and the air thereabout is greatly filled and impregnated with many loud noises and many noisome, unhealthful stenches, stinks and smells, all of which are very offensive to the residents and citizens of the plaintiff and to those persons who necessarily go to and from said village for the transaction of business and otherwise. The court finds that such conditions constitute a great, irreparable, continuing and common nuisance to the citizens and residents of said village. The court further finds that said stock-yards, pens, and inclosures, by reason of the close proximity to the principal streets of said village, their nearness to the business and residence houses of said village, and also by reason of all the facts hereinbefore set forth, and all of the facts alleged in plaintiff's petition, constitute, in their present location, and would constitute at any place within two blocks from such location, a continuing public nuisance which should be abated, and

for which there is no adequate remedy at law. The court further finds that the plaintiff is entitled to maintain this action." A perpetual injunction was granted accordingly.

Three points are argued on behalf of appellant: First, that the village has no right or authority to maintain this action; second, that the court erred in holding that the stock-yards and the maintenance and the use of them were a nuisance, either public or private, which required removal; and, third, that the decree is so indefinite, uncertain and unreasonable that it should be reversed.

As to the contention that the village has no right to maintain the action: It is first argued that there was no public nuisance or offense shown. This will be considered later in passing upon the sufficiency of the evidence.

It is next said that the village is given express authority to deal with the subject of nuisances by ordinances, and is not given any right to sue, and the case of *City of Ottumwa v. Chinn*, 75 Ia. 405, is cited as upholding this argument. We are not impressed with the doctrine announced in that case, and are of the opinion that, under the corporate and general powers conferred by sections 41, 56, 69, art. I, ch. 14, Comp. St. 1909, it was entirely proper to obtain the judgment of a court of equity as to whether or not a public nuisance existed, and its aid to abate the same if one existed. We believe that the supreme court of Minnesota in the case of *City of Red Wing v. Guptil*, 71 Am. St. Rep. 485 (72 Minn. 259), in holding that "a city authorized by its charter to abate or compel the abatement of public nuisances has power to compel the abatement of a nuisance affecting the comfort or convenience of the public, * * * and, therefore, it may maintain an equitable action to aid in compelling an abatement of such nuisance," announces a sounder and better rule. This doctrine is supported by the following authorities: *Hickory v. Railroad*, 141 N. Car. 716, 53 S. E. 955; *Moore v. City of Walla Walla*, 2 Wash. Ter. 184, 2 Pac. 187; *Lonoke v. Chicago, R. I. & P. R. Co.*, 92 Ark. 546, 123 S. W. 395; and by many others. The reasoning

set forth in the opinion in *State v. Ohio Oil Co.*, 150 Ind. 21, 47 L. R. A. 627, with reference to the right and authority of a state to maintain an action for injunction against a public nuisance, which is in line with similar views expressed by this court in *State v. Pacific Express Co.*, 80 Neb. 823, we think applies to the right of a municipal corporation in the same behalf. We prefer to follow the doctrine of these cases, rather than that of the Iowa case cited. We are satisfied that it was not incumbent upon the village to enact an ordinance prohibiting the maintenance of stock-yards in the locality complained of before it had the right to apply to a court of equity for relief.

As to the second point: The evidence shows that about 30 years ago or more, when the railroad was first built and a station located at Kenesaw, the country was new and the town was only in embryo; that during this interval of time the population has increased until there are now about 1,000 people residing in the village. The business of the railroad company has increased in proportion, and it became necessary from time to time to make several additions to the stock-yards in order to accommodate the increased business; the last addition being made about six years ago. The station and the stock-yards were built originally in close proximity. There was no good reason at that time why they should not have been so situated; however, as population increased and business grew, it was entirely natural and proper and to be presumed, in the usual course of events, that the business houses of the community would be erected in the neighborhood of the station, and that this would form the nucleus around which the village would grow. This was what actually occurred. The evidence shows the village, or at least that part of it near the railroad and stock-yards, is built upon land which is almost level; that the railroad company in endeavoring to prevent the nuisance has filled in the stock-yards with broken stone, which has made the floor almost impervious to water and elevated it above the ad-

jacent land so that the filth and excrement, when the yards are washed or after a heavy rain, drain into an open ditch running parallel with the railroad, and that the odors arising from the intermingled mud and excrement are exceedingly annoying in hot weather to the residents of the village living on the leeward side of the track. There being no sewerage or means of rapid drainage, the facilities for keeping the yards clean are not very good, so that, while the railroad company seems to have exerted reasonable efforts to remedy the conditions, it has been unable to prevent the existence of a nuisance, at least to an extent very annoying to the residents living near by. The evidence also shows that live stock is loaded usually on Wednesday and Sunday, and that the consequent noise is disagreeable to church goers. We are inclined to think that under these conditions the rights of the inhabitants of the village to freedom from noxious odors and interference with their Sunday peace and quiet is superior to that of the railroad company to maintain the stock-yards in their original situation. It is true that the railroad company must have facilities within a reasonable distance of its station to carry on its business as a common carrier for hire of live stock, and it is inevitable that there should be more or less unpleasant features connected with this department of its activities. It is not every petty annoyance of the nature of that in this case that the courts will enjoin. The whole circumstances and what is fair, just and equitable between the public at large and the railroad company in the discharge of its duties as a common carrier must be considered. An injunction will be granted when the evils complained of are substantial and cannot be otherwise remedied, and when the business may be conveniently carried on elsewhere.

The decree of the district court enjoined the defendant for maintaining stock-yards within two blocks from the place where the same are now located. The defendant complains that the decree is so indefinite and uncertain in its requirements that it should be reversed. The principal

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complaint seems to be that the court did not fix the exact spot to which the stock-yards should be moved, and it is said: "No place the company might select, if it tried to abide by the order, would furnish the slightest protection under this decree. The stock-yards are no more a nuisance at the present location than they would be three blocks from it." It was not the duty of the court to fix a place where the defendant might carry on its business. Its only function was to restrain a public nuisance. It found from the evidence that the surroundings of the stock-yards were such that, if moved less than a distance of two blocks in either direction from the present location, their maintenance would still annoy the people of the village. Beyond that it left the question of their location to the good judgment of the defendant, and very properly did not seek to interfere with its discretion. We think the evidence supports the decree

The judgment of the district court is therefore

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES, V.
FRANCIS D. COOPER ET AL., APPELLANTS.

FILED JUNE 12, 1912. No. 17,499.

1. **Corporations: INSOLVENCY: LIABILITY OF STOCKHOLDERS: LIMITATIONS.** In an action in equity to enforce the liability of stockholders of an insolvent corporation, a finding of the amount of the liabilities of the corporation and judgment against each stockholder for his proportion of such liability is not a final disposition of the proceedings; and, if some of these judgments against the stockholders are not paid, an application for further judgment against the stockholders is not a new cause of action.
2. ———: ———: ———: ———. In such a case, where it is shown that executions upon the judgment were issued against some of the stockholders and returned unsatisfied, the failure of plaintiffs to collect from such stockholders will not constitute such laches as to relieve other stockholders of further liability.

8. Interest. The original judgment against the appellants having been paid upon its rendition, interest is chargeable, under section 4, ch. 44, Comp. St. 1911, upon the remaining amount for which each defendant is liable from the date of demand and refusal.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John C. Wharton and William Baird & Sons, for appellants.

Henry E. Maxwell and Will H. Thompson, contra.

LETTON, J.

The facts involved in the action in which the proceedings now complained of were taken may be found fully set forth in the former opinion, 89 Neb. 632. Briefly stated, plaintiffs brought an action against the defendant corporation and its stockholders predicated upon the failure of the corporation to comply with the statutory requirements as to the publication of notice of indebtedness. A finding of the amount due the several plaintiffs was made on March 21, 1893, and it was adjudged that all the defendants were jointly and severally liable under section 136, ch. 16, Comp. St. 1889, for the amount of the judgment. Each defendant was adjudged to pay a specific amount, and the case was held for further decree in the event of any of the defendants failing to pay. On October 21, 1908, a motion was filed by the plaintiffs for judgment against defendants Phelps, Stuht, Kuhfall, and others for the balance remaining unpaid on the judgment. Defendants appealed to this court, and in the opinion referred to the judgment of the district court was reversed. It was held that chapter 13, laws 1891, applied, and not the former statute, and that the extent of recovery was limited by the provisions of that act. After the case was remanded plaintiffs filed another motion for judgment against the above named defendants under the decree of

March 21, 1893. Objections were filed which, in effect, set up as defenses: First, the statute of limitations; and, second, the doctrine of laches. The court found for plaintiffs for the balance remaining unpaid of the defendants' liability, under the act of 1891, with interest from the 26th day of October, 1908, and rendered judgment accordingly. Defendants appeal, and plaintiffs have filed a cross-appeal claiming that the district court erred in failing to allow interest against each defendant from the date of the decree in 1893.

The issues were submitted to the district court upon a stipulation of facts. This shows that between the rendition of the decree and judgment, in 1893, and August 18, 1898, seven executions and two vendi. were issued upon it. The last of the money received from executions was applied on the judgments on December 30, 1897. Execution was again issued in 1898, and returned *nulla bona* in December of that year. Certain payments were made on February 8, 1910, as the result of a decree in a mortgage foreclosure suit against defendant Goodman, in which plaintiffs were adjudged to have a first lien on the real estate by virtue of the judgment of 1893. A witness at the hearing in 1908 testified that the record showed that Goodman owned other real estate in Douglas county than that sold on the executions, and defendant Stult then testified that this real estate was of the value of \$20,000.

As to the contention that the proceedings are barred: It is said that the motion is in effect a supplemental petition which sets up causes of action based upon two things—the decree of March 21, 1893, and the subsequent default of the codefendants; that the issues thus made were not involved in the decree of 1893; and that the cause of action accrued when the other defendants failed to pay the amounts adjudged against them, which was more than four years before the filing of this motion.

The principal action was brought within the statutory period and has been pending in the district court ever since. It is true that judgment was rendered for a por-

tion of the liability, and that further proceedings against the appealing defendants were stayed while efforts were made to collect from the others; but the failure of co-defendants to pay the amount adjudged against them can hardly be said to be a cause of action against these defendants. The real cause of action had been adjudicated in 1893, and all that was left undone was for the court, if it afterwards became necessary, to ascertain and apportion among defendants the liability to pay the remainder of the debt in accordance with the statute. This might have been done in the first instance by rendering judgment for the whole amount and providing that executions issue under the court's direction until the entire judgment was satisfied. *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593. The issuance of a new execution in such case is not the accruing of a new cause of action, and neither can the calling of the attention of the court to the fact that a further judgment was necessary be properly so considered.

As to the plea of laches: There is no proof in the record that plaintiffs had any knowledge other than that derived from the returns upon the executions issued that the defendant Goodman owned other property from which the judgment against him might have been realized. Moreover, if the defendants had knowledge that their co-defendants possessed property from which the original judgment could have been collected, there is nothing to show that they ever called the attention of the plaintiffs to that fact. Executions were issued until the officers found no more property on which to levy, and money was collected and applied on the judgment as late as February 8, 1910. Under this condition of the record, we find no facts to justify the application of the doctrine of laches.

The district court refused to allow interest from the date of the first decree, but allowed it from October 26, 1908, when the plaintiffs filed their motion for further judgment. It is said this was upon the theory that the

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defendants were then first called upon to pay the balance owing, and that inasmuch as they refused to make such payment they were chargeable with interest from that date. Defendants were not liable, as plaintiffs claim, for interest from the date of the original judgment, because they paid the sum then definitely adjudged against them in full. Demand was made for the balance due by the motion of October 26, 1908. It is true the demand was made for more than was due, but no offer was made by defendants to pay the true amount and they resisted the claim *in toto*. We think that under section 4, ch. 44, Comp. St. 1911, which provides for interest on money due and withheld by unreasonable delay the district court took the proper view.

Finding no error, the judgment of the district court is

AFFIRMED.

**CITY SAVINGS BANK, APPELLANT, v. JOHN C. THOMPSON
ET AL., APPELLEES.**

FILED JUNE 12, 1912. No. 16,680.

1. **Homestead: LIENS: PURCHASE MONEY.** The unpaid price which a married woman agrees to pay for land is a lien on a subsequently acquired homestead interest therein, though her husband did not execute and acknowledge the contract of purchase.
2. ———: ———: ———. Money loaned by a vendor to vendee to improve the land purchased, pursuant to the terms of the sale, is not purchase money, within the meaning of the statute which subjects a homestead to execution for the satisfaction of a decree foreclosing a vendor's lien. Comp. St. 1911, ch. 36, secs. 3, 4.
3. ———: **CHANGE OF LOCATION.** By moving from one lot to another a dwelling-house constituting part of a homestead, the homestead interest in the house is not lost, where the owner and his family live in it while it is being moved, abandon the old location, and in the new location continue to occupy the house as their homestead.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed with directions.*

William Baird & Sons, for appellant.

A. S. Churchill and John G. Kuhn, contra.

ROSE, J.

This is a suit to foreclose a contract for the purchase of a five-acre tract of land in Douglas county. The instrument was dated November 9, 1904. The City Savings Bank, plaintiff, was vendor and Emma V. Thompson was vendee. She agreed to pay for the land \$1,000 in monthly instalments, and plaintiff promised to furnish her \$1,000 to improve it, and did so. When the contract was executed, she was living with her husband and five children in a two-story frame house on a lot in Omaha about three-fourths of a mile from the land purchased. Pursuant to the terms of the agreement the money furnished to her by plaintiff was expended under her orders in moving to and upon the five-acre tract the family dwelling-house in Omaha, and in paying for carpenter work, plastering, painting and masonry, and in making other improvements on the new premises. The house was moved while the family occupied it, and it continued to be their home. The purchase price of \$1,000, the \$1,000 to be furnished for the improvement of the tract, and interest on both items, amounting to \$1,011.72, were included in the contract as purchase money, to be paid in monthly instalments of \$24 each, with the exception of the last, which was \$35.72, due May 1, 1915. For each of the monthly instalments, 125 in all, vendee gave her note, the aggregate being \$3,011.72. Notes 1 to 32, inclusive, were paid. The note due September 1, 1907, and the rest of the notes are unpaid. Vendee died November 1, 1908. The defendants are her husband, her children and the administrator of her estate. Defendant John C. Thompson, hus-

band of the deceased vendee, answered, and adduced evidence tending to prove that he had constructed the house moved from the lot in Omaha to the five-acre tract; that its value when moved was about \$2,000; that he lived in it with his family while it was being moved, and continued to occupy it as a home at the new location; that before and after it was moved, and during the time of the removal, it was his homestead; that he did not execute or acknowledge his wife's contract of purchase, but refused to do so; that he did not convey, incumber, or release his homestead interest in his dwelling-house, within the meaning of the statute, which declares: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Comp. St. 1911, ch. 36, sec. 4.

To show the real nature of the transactions between his wife and plaintiff, he also pleaded the following as part of the original contract, John F. Flack, by whom it was executed on behalf of the City Savings Bank, being treasurer thereof: "Omaha, Neb., Nov. 8, 1904. Mrs. John C. Thompson, City: In connection with the contract which you have entered into with the City Savings Bank for the purchase of the north $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 32-16-13, it is hereby understood that \$1,000 is to be advanced to you for the purpose of moving your residence which is now on 40th avenue near Grand avenue onto this property; the carpenter work, plastering, painting and brick work on said property to be paid from this \$1,000 remaining due you; also the well, fruit trees, etc., amounting to about \$....., and about \$.....to be used for the purchase of live stock and machinery to do the work on said place; and that we will not charge you interest on this money advanced until such time as it is paid out. John F. Flack."

Plaintiff asserts that the entire unpaid debt evidenced by the notes is purchase money and consequently is the first lien on the land and on all the improvements thereon.

The trial court, however, took a different view of the case and decreed that the purchase price was \$1,000 only; that the sum of \$1,000 advanced for the moving of the house and for the making of other improvements was a loan to vendee and no part of the purchase price; that all payments of principal and interest included in the canceled notes be applied to the purchase price, leaving due thereon a balance of \$381.32, which is the first lien on the land, but not on the improvements; that the husband and children of vendee have a homestead interest in the house and outbuildings to the extent of \$2,000, which, as to improvements, is superior to all other claims or liens; that the homestead interest of \$2,000 attached to the land when the house was moved thereon November 24, 1904, and is inferior only to plaintiff's lien for the balance of the purchase price—\$381.32; that plaintiff has also a lien on the five-acre tract for \$1,483.44; that the land and the improvements thereon be sold, "provided said premises shall be sold for more than enough" to pay costs, taxes, the homestead right of \$2,000, and the amount of plaintiff's first lien; that in case of a sale the proceeds be applied, first, to costs and taxes; second, to the homestead interest of \$2,000; third, to plaintiff's first lien of \$381.32, and the balance, on order of the court, to the other lien of plaintiff. From this decree plaintiff has appealed.

There is no dispute about any material fact. The effect of the homestead interest of defendants on the contract of purchase, under the circumstances of the case, is the controlling question. Except for that interest, plaintiff's right to a strict foreclosure for the unpaid debt would be obvious. Plaintiff insists that the money advanced to the vendee for improvements went into the property with the knowledge and consent of her husband, and that her indebtedness under the terms of her contract is purchase money, within the meaning of the law that a contract for the purchase of land, or a mortgage given by a wife to secure unpaid purchase money, is valid security, though not signed by the husband, notwithstanding the property

was purchased for and occupied as a homestead. *Prout v. Burke*, 51 Neb. 24. The statutory provision is that the homestead is subject to sale in satisfaction of a judgment obtained on a vendor's lien. Comp. St. 1911, ch. 36, sec. 3. The fallacy in plaintiff's argument is that the money advanced for improvements is not, as to the homestead right, under the facts disclosed, a part of the purchase price of the land. It is true that vendee in her contract treated her entire indebtedness as purchase money, but her husband did not join in the contract. In so far as his homestead interests were concerned, he had a right to defend the foreclosure suit in the light of the actual transactions. When his wife bought the land, there were no improvements on it. His own house, after it was moved, was the first improvement on the five-acre tract, and the money furnished by plaintiff for improvements was subsequently paid out. In *Smith v. Lackor*, 23 Minn. 454, the supreme court said: "A debt incurred for lumber to build a dwelling-house on a lot held under a contract of purchase, and claimed and occupied as a homestead, represents no part of the purchase money of such homestead." Under the laws of this state, the homestead is exempt from judgment liens and from execution and forced sale except for debts secured by mechanics', laborers' and vendors' liens, and for debts secured by mortgage executed by both husband and wife or an unmarried claimant. Comp. St. 1911, ch. 36, sec. 3; *Fox v. McClay*, 48 Neb. 820.

The evidence is conclusive that the husband did not execute the contract of sale, but refused to sign it. He abandoned his homestead on the lot in Omaha as soon as his house was removed therefrom. During the removal it was occupied by himself and family with the definite intention of making it their home when located on the land purchased. That purpose was carried out. The homestead, therefore, was changed from the old location to the new. *Maguire v. Hanson*, 105 Ia. 215. The statute makes "the dwelling-house in which the claimant resides"

an essential part of the homestead. Comp. St. 1911, ch. 36, sec. 1. The homestead may be sold and a new one selected. For the period of six months the proceeds, like the homestead itself, are entitled to protection from legal process. Comp. St. 1911, ch. 36, secs. 13, 16. If the proceeds of the sale of a homestead are protected in currency and in other forms of property, the dwelling-house, which is an essential part of the exempt property, is certainly entitled to the same protection, when claimed as exempt and occupied as a homestead in a new location. Did the husband of vendee, by permitting his dwelling-house to be moved on the land purchased by his wife from plaintiff, subject his homestead interest to a lien for the money furnished to her for improvements? If his homestead interest in the house was charged with a lien in favor of plaintiff, for the money advanced for improvements, that result was not accomplished by any instrument "executed and acknowledged by both husband and wife," as required by statute. Plaintiff knew that he refused to sign the contract. That part of the agreement pleaded by defendants refers to the house as the residence of vendee. Since the money furnished to her for improvements is not a part of the purchase money, since her husband did not execute or acknowledge the contract of purchase, since he retained and asserted his homestead interest in his house after it was removed, and since he occupied it as such in the new location with plaintiff's knowledge of the facts, a vendor's lien for the money advanced for the improvements, as distinguished from purchase money, did not attach to the homestead. This conclusion is not demanded by the principles of justice governing courts of equity independently of statute, but there does not seem to be any way to avoid it without doing violence to the homestead laws.

The decree, however, is erroneous in subjecting plaintiff's lien for unpaid purchase money to the homestead interest in the improvements. When the husband of vendee permitted her to move his house onto the land pur-

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chased, he knew the surrounding circumstances. He had discussed with plaintiff the terms of the contract. He knew that plaintiff had a valid purchase-money lien for \$1,000 on the land before his house was moved onto it. He could not lawfully disturb that lien or interfere with plaintiff in enforcing it by permanently attaching his house to the land. By that act, he subjected his improvements to the vendor's lien, which, under the circumstances of this case, is by statute made superior to the homestead. The decree should have provided, without condition, for the sale of both land and improvements to satisfy the amount due plaintiff for purchase money, and interest thereon, taxes and costs of suit. It is therefore reversed and the cause remanded, with directions to the district court to modify the decree to conform to the views here expressed. Defendants will be required to pay the costs in this court.

REVERSED.

BARNES, J., concurring separately.

The policy of the law is to preserve the homestead for the use of, and to furnish shelter for, the family, and it therefore contains the wise, just and humane provision that the homestead cannot be incumbered except by a contract in writing signed and acknowledged by both husband and wife. In this case the husband refused to waive his right or incumber his homestead, and his wisdom and forethought seem to be fully justified by the record.

It appears that the wife is dead, and, if the view expressed in the dissenting opinion should prevail, the plaintiff would be allowed to deprive the defendant and his family of their home for the repayment of the money advanced by it to improve the property in question. For this the law gives the plaintiff no lien. It is true that the materialman and a contractor who performed labor and furnished material for that purpose could have obtained a lien on the homestead therefor, but the law makes no

provision for such a lien in favor of one who advances money with which to pay for such improvements.

It is suggested in the dissenting opinion that the sole ground of defendant's refusal to sign the contract was to avoid a personal liability. This suggestion does not seem to be supported by the record. On the contrary, his refusal must have been made in anticipation of the situation which now confronts him—that of having the home for himself and family swept away by the plaintiff's demands. I am therefore of opinion that the views expressed by the majority of the court are correct.

Again, it may be assumed that the property is of sufficient value to satisfy the plaintiff's claim without resorting to the homestead, which should not be sacrificed for that purpose.

SEDGWICK, J., dissenting.

The policy of our law is to encourage the improvement of homesteads. There are no restrictions placed upon adding to, improving or beautifying the homes of the people. If this plaintiff had removed defendant's house for them and placed it on this new homestead, and had repaired the house and otherwise improved and beautified it, the plaintiff could have filed a lien for the amount so expended and the homestead would be liable for it. In this case the plaintiff had no occasion to file a lien, because it had already a contract with the owner of the fee for the very thing for which the law would have allowed it to file a lien, to wit, for improvements made to their home. It was not necessary to have a contract for this purpose with any one except the owner of the fee. The husband refused to sign the contract. He did not own the fee in the land, and did not want to make himself personally liable for the purchase price. The property itself was good for it, and, if that is not enough without making the husband also personally liable, they might get along with the old home. There seems to have been no other reason for his refusing, as his signature was of no

importance upon the contract except to make him personally liable for the additions they were making to their home. He says that the house was his. He has consented to attach it to his wife's real estate and make it a part thereof. He says that the house was moved and made a part of his wife's real estate without his consent. If he had not consented to it, it would never have been moved, and if he objected to having so good a home as his wife seems to have been trying to provide for him, and did not want the building used for that purpose, he should have said so at the time. This he did not do, and he ought certainly now to be held to have consented to, and to have participated in, making the house a part of the real estate, and their home, and adding to it the improvements that were made. If he consented to the improvements, and the wife who held the legal title agreed that they should be a charge upon the property, and he has been for these years enjoying the benefit of those improvements, the policy of the law is to charge them upon the homestead. He knew that his wife had contracted to make these improvements a charge upon the homestead, and, knowing that, he moved his house upon his wife's land, made it a part of the real estate to be charged with the improvements, and adopted it as their homestead. The improvements were made and he is enjoying them as his home. If I buy a lot, upon which to make a home, for \$1,000, with the agreement that the party from whom I buy it shall fill it up to grade at an expense of \$500, and that I will pay \$1,500 for it all improved, the filling up of the grade is as much a part of the property purchased as is the original lot. So, if I contract for a lot and agree that certain improvements or additions shall be made thereto, and that I will pay so much for the lot and the improvements, the amount that I pay towards the improvements is as much the purchase price of the lot as though the improvements had been made before I thought of making any contract, and that seems to me to be precisely this case.

REESE, C. J., and HAMER, J., concur in this dissent.

PAUL H. DASSLER ET AL., APPELLANTS, V. CHARLES ROWE
ET AL., APPELLEES.

FILED JUNE 12, 1912. No. 16,722.

Corporations: PURCHASE OF STOCK: RESCISSION OF CONTRACT. A purchaser of capital stock of a corporation cannot rescind the sale and recover back the consideration paid on the ground that he was induced by fraudulent representations to make the purchase, where he thereafter treated the stock as his own, accepted the benefits thereof, entered into a contract to sell a number of the shares, served as a director of the corporation and participated in its management, with a full knowledge of the facts on which his charges of fraud are based.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

G. H. Merten and H. B. Fleharty, for appellants.

Lambert, Shotwell & Shotwell, contra.

ROSE, J.

For the price of \$1,500 plaintiffs bought from a shareholder in the Mid-West Specialty Company 60 shares of the capital stock of that corporation. On account of alleged fraudulent representations inducing the purchase, this action was brought to rescind the contract and to recover back the consideration paid. Defendants denied the fraud charged, and pleaded ratification. After hearing the proofs of plaintiffs the trial court dismissed the suit, and they have appealed.

The evidence of plaintiffs shows that, after they learned the facts upon which their allegations of fraud are based, they treated the shares of stock as their own, accepted the benefits thereof, and entered into a contract to sell a number of shares after they brought the suit. From the purchase to the trial plaintiff Paul H. Dassler served as a director of the corporation and participated actively in

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transacting its business. On these facts alone, the trial court properly dismissed their action on the showing made by themselves. *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434; *Arnold v. Dowd*, 85 Neb. 108.

AFFIRMED.

ROBERT CAULK, APPELLANT, v. MARIE CAHOON CAULK,
APPELLEE.

FILED JUNE 12, 1912. No. 16,746.

Marriage: ANNULMENT: ORDER FOR SUPPORT OF CHILD. In a proceeding by a father under the statute (Comp. St. 1911, ch. 25, sec. 33) authorizing him to bring a suit to annul the marriage of his son on the ground that he was married without the consent of his parents before he was 18, and did not cohabit with his wife after he attained that age, an order requiring plaintiff to pay money for the permanent support of defendant's child is erroneous.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed in part and reversed in part.*

Kingsbury & Hendrickson, for appellant.

J. J. McCarthy, contra.

ROSE, J.

This is a proceeding by a father under the statute authorizing him to bring a suit to annul the marriage of his son on the ground that he was married without the consent of his parents before he was 18, and did not cohabit with his wife after he attained that age. Comp. St. 1911, ch. 25, sec. 33; ch. 52, sec. 2. Plaintiff's pleadings and proof conformed to the requirements of the statute, and the marriage was annulled. Before the action was brought, however, the minor's wife had given birth to a child, and the trial court, on a cross-bill by defendant,

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ordered plaintiff, the father of the minor whose marriage was canceled, to pay to the clerk of the district court for the permanent support of the child the sum of \$800. From this allowance plaintiff has appealed.

The statute does not make the plaintiff, who is the parent of the minor, liable for the support of defendant's child. Liability for such an allowance, if considered as alimony, does not extend to the father of the married minor. That part of the decree requiring plaintiff to pay \$800 for the purpose stated is erroneous. There does not appear to be any division of authority on the subject. *Stivers v. Wise*, 46 N. Y. Supp. 9; *Thayer v. Thayer*, 9 R. I. 377; *Osgood v. Osgood*, 2 Paige Ch. (N. Y.) *621; *Sturgis v. Sturgis*, 51 Or. 10, 15 L. R. A. n. s. 1034.

Other assignments of error are disregarded as not available on the record presented. That part of the judgment relating to the erroneous order mentioned is reversed.

REVERSED AS TO PERMANENT ALLOWANCE,
BUT OTHERWISE AFFIRMED.

IN RE HARRY W. BURDICK.

FILED JUNE 12, 1912. No. 17,064.

Parent and Child: CUSTODY OF CHILD. Where a mother dies immediately after the birth of a child, and the father commits it to the custody of a competent woman who properly cares for it in a suitable home without compensation, and the father permits a mutual attachment to grow up between them for a number of years under a contract with him awarding to her its permanent custody, in a proceeding by the father to regain his child, the general rule, that the controlling consideration is the child's own best interests, applies.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

Sullivan & Squires, for appellants.

Silas A. Holcomb and *A. P. Johnson*, *contra*.

ROSE, J.

This is a controversy over the custody of a child named Bertha Mildred Burdick. It was born November 13, 1906, and its mother died five days later. Before it was a week old it was taken to the home of Bert Kaelin, where it remained for more than three years. Kaelin's family consisted of himself, his wife, and two children—a boy ten years old and a girl of the age of six. May 14, 1910, Harry W. Burdick, the father of the child, petitioned the county court of Custer county for a writ of habeas corpus to obtain its custody, alleging that it was unlawfully deprived of its liberty by the Kaelins. At that time Burdick's family consisted of himself, a second wife, and a little son by his first wife. The rival families are prosperous farmers, living in commodious homes three-fourths of a mile apart, in Custer county, near Ansley. The trial in the county court resulted in an order taking the child from the Kaelins and restoring it to its father. Upon a review of the proceedings in the district court the judgment of the county court was affirmed. The Kaelins have appealed to this court.

Is the judgment of the county court free from error? Did the best interests of the child, when all of the facts, circumstances and conditions disclosed by the evidence are considered, require the county court to take the child from the Kaelins and restore it to its father? These are the questions to be determined.

Both the father and the Kaelins are abundantly able to furnish the child a suitable home, to support it, to educate it, and to bestow upon it a bounty in the form of property or testamentary bequests. It cannot be determined, without disregarding the evidence, that the father is unfit to have the custody of his child. That Mrs. Kaelin

is a suitable person to raise it has been demonstrated by an actual test of motherly devotion and care above the criticism of the father himself. The decision must therefore be controlled by other considerations.

The father asserts his rights as the natural guardian of his offspring. He further urges that he has a suitable home; that he has remarried and can properly care for his child; that his present wife will give it the care of a mother; that, according to the expressed wish of the child's mother and his own desires, his two children should be raised and educated together; that for their own good they should be companions; that the ties between brother and sister will be a benefit to both, if they are permitted to live together; that the control of a father is the best assurance of the child's welfare and happiness; that the Kaelins obtained only temporary custody of the child, with the understanding they should receive compensation, which he is willing to pay; that, for the purpose of preventing his own relatives from interfering with its custody, he entered into a contract allowing Mrs. Kaelin to keep it, but not for the purpose of abandoning his own rights as parent; that the contract was void as to him, and that the best interests of the child demand that it be restored to his custody and control.

The merit of these propositions cannot be determined without a full consideration of other facts. In a controversy like this the court is not bound as a matter of law to restore the child to its father. The welfare of an infant is paramount to the wishes of the parent, where it has formed a proper and natural attachment for another person who has long stood in the relation of a parent with the parent's consent. *Sturtevant v. State*, 15 Neb. 459; *Norval v. Zinsmaster*, 57 Neb. 158; *State v. Porter*, 78 Neb. 811.

Before and after the death of the mother, Mrs. Kaelin was at her home to minister to her and to her child without compensation. At the request of its father she took the child and its little brother home with her, and for a

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short time kept an account of her expenditures in behalf of the baby. The little boy returned to his father in three weeks, but went back at intervals, remaining for a short time only. The child was sickly, and for three months it took practically all of Mrs. Kaelin's time. Like an anxious and devoted mother she spent entire nights with it without sleep. One night, when it was sick, she telephoned for its father, and he came to see it. Afterwards she again telephoned for him in the night, but he declined to come, saying she knew better than he what to do. Constant attention to the helpless, innocent child produced the natural result. There soon came a time when she recognized a growing attachment for it and when she began to dread a separation. After considerable discussion, the following contract in writing was duly executed: "This agreement made and entered into this 16th day of March, A. D. 1907, by and between Harry W. Burdick of the first part and Blanche Kaelin of the second part, witnesseth: That Harry W. Burdick of the first part is the father of Bertha Mildred Burdick, his minor child; and that said Harry W. Burdick has this day voluntarily relinquished all his right to the custody of and control over said Bertha Mildred Burdick, and to the services and wages of said child; to the end that said Bertha Mildred Burdick should be adopted by Blanche Kaelin, and that said Blanche Kaelin shall bestow upon said Bertha Mildred Burdick all the care of and control over, as should be bestowed upon a child born in lawful wedlock. It is further agreed that the first party shall, at all reasonable times, be permitted to visit said Bertha Mildred Burdick and to have said Bertha Mildred Burdick visit him, if she so chooses. It is further agreed that, should the second party not provide the proper care of said child, then the said Harry W. Burdick shall have full right to take said child and declare this contract null and void. Harry W. Burdick, Blanche Kaelin. Witness: C. Mackey."

Consent to the adoption was withdrawn. Of course, a

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ring into a contract of this kind, cannotations to his offspring; nor can such an invade the means of keeping a child in an unsuitable place, where a proper one is available. An examination of the opinions discussing this subject shows the correctness of the following editorial note found in *State v. Steel*, 16 L. R. A. n. s. 1004 (121 La. 215, 46 So. 215): "Though it is quite generally held that a contract whereby a parent intrusts to another the custody of his child, with the understanding that his rights thereto as parent are thereby transferred, is against public policy and unenforceable, yet, the cases are numerous where the court is at great pains to discover whether or not such an agreement has been made. To such a contract great importance is attached; and oftentimes, especially where both claimants for the child are equally fit, such contract is the deciding factor."

Though Burdick insists that the contract was made to protect the child's custody from the interference of his relatives, his own testimony shows that every time he thereafter mentioned the subject to Mrs. Kaelin she asserted her absolute right of control, and that her will in that respect prevailed. She kept the child three years after he remarried. She and her husband have defended their possession in three courts with a vigor which could not be surpassed on behalf of their own children. When Burdick spoke to Mrs. Kaelin about paying for keeping the child, she resented it, saying she could not be compensated in money. He never in fact gave or paid her anything of value beyond \$18—an insufficient reward for taking care of his little boy alone, though she made no charge for doing so. No disinterested person can read the record without being convinced that she believed in her right of custody under her contract. After the agreement was executed she allowed the child to pull at her heart-strings, and she reciprocated without restraint. She testified without qualification that her attachment for the child was the same as for her own children. When the writ was served

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upon her, all the child knew of home and mother had been learned at the Kaelins, where it was happy and contented. Such ties cannot be severed without affecting the child. Did its best interests require a separation? Mrs. Kaelin has children of her own. Her spirit has been refined in the crucible of motherhood. She has been a teacher. In her home the child hears language and observes manners born of culture and refinement, where there are pictures, flowers and music. There it is under moral and religious influences softened by liberality and freedom. A court may well hesitate to take a child away from such surroundings to try an experiment elsewhere. It is no disparagement to the stepmother to say that these conditions cannot be equaled in her home. Upon a few days' acquaintance she was married to the father of the child six months after the death of its mother. She is ten years older than her husband, has no children of her own, and has passed the time of life when she can hope to become a mother. At the trial she made no claim to an affection for the child beyond that imposed by her duties as a stepmother. These facts are not mentioned as reflections upon her fitness to have the custody of the child, but to suggest the difference in conditions to which a change of custody would subject it. Mrs. Burdick has a large, well-kept house, near a good school, and her testimony indicates that she would require strict observance of moral and religious principles as she understands them.

At the time of the trial the child's happiness and welfare were assured, for the present at least. To make a change would be an experiment at best. At the Kaelins the father will not be deprived of the companionship of his daughter, but will be welcomed there as a visitor at all proper times, as long as he recognizes their right of custody. Upon a proper consideration of the entire case, it cannot be held that the best interests of the child require a change in its custody. It follows that there was error in the order affirming the judgment of the county court. The affirmance is therefore reversed and the cause re-

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: district court, with instructions to commit
the custody of the child to Mrs. Kaelin.

REVERSED.

ADVANCE THRESHER COMPANY, APPELLANT, v. EUGENE C.
KENDRICK ET AL., APPELLEES.

FILED JUNE 12, 1912. No. 16,941.

Appeal: AFFIRMANCE. "Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial." *Vernon v. Union Life Ins. Co.*, 58 Neb. 494.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

Justin H. Porter, contra.

FAWCETT, J.

From a judgment of the district court for Dawes county, upon a verdict of the jury in favor of defendants, plaintiff appeals.

Plaintiff's abstract states that the petition is based upon seven causes of action, six of which are upon promissory notes, dated March 14, 1908, the last of which matured, upon its face, December 1, 1910, that said notes aggregate \$2,460; that the seventh cause of action is upon an account for goods sold by plaintiff to defendants, aggregating \$40.11; that the petition prayed judgment against defendants for \$3,520.11, with interest from March 14, 1908; that all of these notes were secured by chattel mortgage on one steam traction engine and attachments, which mortgage provided for accelerating the ma-

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turity of the remaining notes in case any of them should not be paid at maturity; that the notes set forth in the first and second causes of action were matured on their face when the petition was filed; and alleges the maturity of the remaining notes under the clause in the chattel mortgage providing for accelerating maturity.

The answer is quite voluminous. Among other things, it alleges, in substance, that the engine was not as represented; that it would not do the work; that, when notified, plaintiff furnished an expert engineer of its own to set the engine to work and to instruct defendants in its use; that the engine would not develop half its rated horse-power; that it was not well made or of good material and workmanship, and was inferior to traction plow engines of much smaller size, manufactured by other concerns; that the trial of the engine lasted over six weeks and was conducted by experts and other agents and employees of plaintiff, with the assistance of defendants, but that the engine would not do the work; that the parts constantly broke and wore out, "and said experts ordered new ones without authority of defendants;" that defendants paid the freight in the amount of \$261.63 and were put to other expenses, which, with the item for freight, aggregated \$848.37, for which, by way of cross-petition, they demanded judgment. In appellees' "additional abstract" it is shown that the answer further alleged that, the representations of plaintiff and its agents having proven false and the warranty having wholly failed, and the engine having never been accepted by defendants, but having remained with them and plaintiff's agents during the trial and testing thereof and the engine being wholly unsuitable and unfit and incapable of being used as a traction plow engine of sufficient traction power to plow or pull the plows referred to in the answer, or to develop the draft power rated, or to otherwise do the work as represented and warranted by plaintiff, and being of poor workmanship and material and continually breaking down and wearing out in parts and

wholly worthless to defendants as a plow draft engine, they returned said engine and all parts, including those items enumerated in plaintiff's seventh cause of action, to plaintiff at Marsland, and plaintiff received and took the same and converted it to its own use. The reply, as set out in plaintiff's abstract, admits that the notes were given for the entire purchase price of the engine, but denies every other allegation in the answer, and sets forth the warranties as contained in the written order for the engine given by defendants.

In its brief plaintiff states: "Default was made in the payment of the first two notes, and appellant exercised its option to accelerate maturity of the remaining notes, took possession of the machine under its chattel mortgage, advertised and sold it, and brought this action to recover the deficiency of the debt." The trouble with this statement is that it finds no support in either the pleadings or the evidence. There is no reference whatever in the pleadings as to any possession taken or sale made of the engine under the chattel mortgage. The mortgage is not even set out in the abstract. The only evidence in relation to any proceedings under it is the testimony of Mr. Redinbaugh, who acted for plaintiff in the sale of the engine to defendants, and who resold it after it had been returned by defendants to the railroad track at Marsland, as follows: "I sold it to Harry Pierce under the chattel mortgage." When Mr. Pierce was introduced as a witness, by plaintiff, he testified that he bought the engine from Redinbaugh; that he first saw it at Marsland; next on a flat car at Hemingford, from which it was unloaded and taken to his ranch; that the next morning "we went to plowing with it; we hitched on four plows in each gang, went out to a rather rolling piece of ground, put the plows in and went ahead; there were two gangs of 14-inch Parlin & Orendorf plows; they were mouldboard plows; there were some boxings, that needed tightening up, but otherwise the engine pulled the plows to my satisfaction; I bought the engine after that test the

same day." It appears, therefore, that defendants, being dissatisfied with the engine, returned it to the point where they had received it, and that subsequently plaintiff took possession of and resold it. No evidence was offered to show the value of the machine at the time it was returned. The presumption, therefore, is conclusive that it was of the same value as when received by defendants.

A very vigorous argument is presented by plaintiff, assailing the rulings of the court in permitting defendants to prove representations made by the agent Redinbaugh at the time he made the sale and received from defendants their written contract and the notes set out therein, and upon the further point that, defendants having failed to show written notice to the company at Battle Creek, Michigan, and to its agent who sold the engine, at the time they returned it, the return of the engine was ineffectual to release defendants from their liability upon their notes, and that plaintiff was entitled to an instruction directing the jury to return a verdict in favor of the plaintiff for such amount as the jury might find to be due under the contract. Certain instructions, given by the court, and the refusal of the court to give certain instructions requested by plaintiff are also assailed. We deem it unnecessary to consider any of these questions, for the reason that the verdict returned by the jury was the only verdict which, under the pleadings and the evidence, could be sustained. The fact that plaintiff took possession of the engine and sold it at private sale to another party, thereby converting it to its own use, and offered no evidence to show that the engine was not in as good condition and worth just as much when it was returned by the defendants as when it was delivered to them, renders all of the above contentions immaterial.

AFFIRMED.

LILLIAN FULLERTON, APPELLEE AND CROSS-APPELLANT, V.
MARGARET FULLERTON, APPELLANT; CLARENCE A.
WOODS, CROSS-APPELLEE.

FILED JUNE 12, 1912. No. 16,725.

1. **Trover: JOINT OWNERS.** Two equal joint owners of different articles of property may agree upon a division of one of the articles, and if that agreement is executed and the division made accordingly and the shares so ascertained accepted by the respective parties, and one of the parties afterwards converts to his own use the share of the other party, he will be liable for its value in an action for conversion, although other articles owned jointly have not been partitioned.
2. **Evidence: JOINT TORT-FEASORS: ADMISSIONS.** If two persons jointly convert the personal property of another, admissions of one as to the facts constituting the conversion are competent evidence in an action against both jointly for the value of the property so converted, and neither defendant is entitled to an instruction to disregard the admissions of the other defendant.
3. **Trial: EVIDENCE: REFUSAL OF INSTRUCTIONS.** In such action, if there is sufficient evidence to justify a submission to the jury as to the liability of both defendants, a request to instruct generally that the jury must not consider the admissions of one defendant as evidence against the other is properly refused.
4. ———: ———: **FAILURE TO REQUEST INSTRUCTIONS.** In such action, the fact that the jury found that one of the defendants is not liable for the conversion will not require setting aside the verdict against the other defendant because the admissions of the defendant so found not liable were allowed in evidence, there having been no request for a proper instruction in that regard.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

O. B. Polk, for appellant.

George A. Adams, contra.

SEDGWICK, J.

In 1906 the plaintiff and the defendant Margaret Ful-

Fullerton v. Fullerton.

lerton together owned a section of land in Webster county. Part of this land was under cultivation, and during the season of 1907 it was cultivated on shares by different parties, and a part of the rent consisted of several hundred bushels of wheat. The plaintiff contended that this wheat was divided between the parties by mutual agreement, and that afterwards these defendants converted to their own use a part of the plaintiff's share of the wheat, amounting to something over \$100. She brought this action in justice court to recover the value of the wheat so converted. Afterwards the cause was appealed to the district court for Lancaster county, and upon trial there the plaintiff recovered a verdict and judgment, substantially as claimed by her, against the defendant Margaret Fullerton. The jury found in favor of the defendant Woods. The defendant Margaret Fullerton afterwards appealed, and there is a cross-appeal by the plaintiff from the judgment in favor of the defendant Woods.

The defense of Margaret Fullerton was that she and the plaintiff were joint owners of the land and of the crops, and that there had never been any settlement between them, and that the justice had no jurisdiction because such accounts could not be settled in a court of law, and therefore the district court obtained no jurisdiction upon appeal. If the wheat was divided by agreement between the parties and after the division the defendants converted the plaintiff's wheat, the fact that other crops had not been divided and that there were other unsettled accounts between the parties would not deprive the justice of jurisdiction for conversion of the wheat. The case was tried in the district court upon this theory, and the court with proper instructions submitted the question to the jury as to whether there had been a division of the wheat between the parties agreed upon and accomplished, and instructed the jury that unless there had been such division they must find for the defendant.

It appears from the evidence that the defendant Woods

cultivated a part of the land, but took no part in the conversion of the wheat, unless it was in hauling it to the elevator, and there is sufficient evidence from which the jury might find that both parties consented, and directed him to haul the wheat to the elevator and deposit it there. Upon this evidence the verdict in his favor is supported.

The evidence tends to show that it had been the custom between the parties to allow the tenant who lived upon the land to divide the rent in equal parts, and that the defendant divided this wheat pursuant to that custom with the knowledge and consent of both parties. There is also evidence from which it might be found that after this division Mr. Fullerton, who acted for his wife, the defendant Margaret Fullerton, concluded to retain the plaintiff's wheat until there had been a complete adjustment of their accounts, and he afterwards sold the wheat and received the money for it. The case is not clear and satisfactory, but the issue was fairly presented to the jury, and the judgment is not so clearly unsupported as to require us to reverse it for that reason.

There was considerable evidence as to statements made by the defendant Woods, and also letters written by him, or at his dictation, were received in evidence. It is contended that since the jury found that the defendant Woods was not connected with the conversion, and was therefore not a proper defendant, this evidence of his statements was incompetent and erroneously received. It seems that the defendant Woods was trying to preserve a disinterested position in the matter, and received no benefit from the conversion, but it is not clear that the plaintiff was not justifiable in joining him as defendant, and this objection that is now insisted upon was not suggested when the evidence was offered, and there was no attempt afterwards to strike out his admissions. We cannot find that the court has committed any reversible error in this regard.

The defendant Margaret Fullerton requested the court to instruct the jury that the admissions of the defendant

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Woods should not be considered as evidence against her. There was sufficient evidence against Woods to justify the submission of the case as to both defendants, and there was no request for an instruction that, in the event they found that Woods was not connected with the conversion of the property, and therefore not liable, they should disregard evidence as to statements he had made when not under oath. The request therefore was properly refused.

Other instructions given by the court were objected to, but these objections we think are sufficiently answered in what is said upon the principal defense.

The judgment of the district court is

AFFIRMED.

**FARMERS BANK OF LYONS, APPELLEE, v. ARGO N. DIXON
ET AL., APPELLANTS.**

FILED JUNE 12, 1912. No. 16,747.

Bills and Notes: BONA FIDE HOLDER. If a negotiable promissory note is transferred to a bank as collateral security to an indebtedness to the bank substantially equal to the amount of the note, and the note is so taken by the bank in the regular course of business and without notice of any defense thereto, the bank becomes an innocent holder, and the note is not subject to defenses that may have existed as against the original payee.

APPEAL from the district court for Dixon county: **GUY T. GRAVES, JUDGE.** *Affirmed.*

Kingsbury & Hendrickson, for appellants.

J. J. McCarthy, contra.

SEDGWICK, J.

The plaintiff began this action in the county court of Dixon county against these defendants upon a promis-

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sory note. The case was tried several times in the county court and finally appealed to the district court. In that court the plaintiff moved to strike out several paragraphs of the defendant's answer upon the ground that they raised a new issue not presented in the county court. The defense attempted to be alleged in these paragraphs so stricken out was that the note in suit was given for a horse upon a warranty, and that the horse was not as warranted, and was of no value. It is not at all clear that the rulings of the court in striking out these paragraphs were justified in the condition the record then was, but it does not appear to be necessary to go into a detailed examination of that question because the defense failed upon other ground.

The bank claimed to be an innocent purchaser of the note in the regular course of business, and the defendants alleged in their answer that the note was first transferred to the bank by the payee as collateral security, and that it was afterwards purchased by the bank. There was no allegation that the bank had any notice of any existing defense to the note at the time it was received by the bank as collateral security, and by so receiving it without notice of any defense the bank became an innocent purchaser of the note to that extent. *Lashmett v. Prall*, 2 Neb. (Unof.) 284. It appears to have been taken as collateral to an indebtedness of the payee of the note, and if this indebtedness was afterwards canceled and the note, which was collateral thereto, was taken in payment of the principal debt, the bank would still be an innocent purchaser. One of the defendants testified that he wrote a letter to the bank in which he informed the bank that he had given a note to the payee for a horse, and that the horse was of no value, but this, by his own evidence, was after the bank had taken the note from the payee as collateral to the indebtedness to the bank, and had so become an innocent purchaser of the note. The district court instructed the jury to find a verdict for the plaintiff for the amount of the note and

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interest, and this was the only verdict possible under the defendants' answer and evidence.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF JOHN A. CREIGHTON.

JOHN A. MCSHANE ET AL., EXECUTORS, APPELLEES, V. ELLEN E. CANNON ET AL., APPELLEES; WILLIAM T. THOMPSON, ATTORNEY GENERAL, ET AL., INTERVENERS, APPELLANTS.

JAMES H. MCCREARY ET AL., APPELLEES, V. CATHERINE MCSHANE FURAY ET AL., APPELLEES; WILLIAM T. THOMPSON, ATTORNEY GENERAL, ET AL., INTERVENERS, APPELLANTS.

FILED JUNE 12, 1912. Nos. 16,775, 16,776.

1. **Courts: COUNTY COURTS: JURISDICTION.** The county court has exclusive, original jurisdiction of the probate of wills and the settlement of estates, and its final orders within its jurisdiction are binding upon all parties and not subject to collateral attack.
2. ———: **APPELLATE JURISDICTION: SETTLEMENT OF ESTATE: PARTIES.** An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court; the proceeding being *in rem*, all persons interested in the assets are parties. If A asks for an order of distribution that will exclude B from participation in the assets, he cannot afterwards object to the appearance of B to protect his interest in the county court, or afterwards upon appeal to the district court.
3. **Charities: ENFORCEMENT: ATTORNEY GENERAL.** A public charity is a public benefit, and the attorney general, upon request of the governor, may represent the public in giving force and effect to such charity when its interests are not otherwise adequately represented.
4. **Attorney and Client: AUTHORIZATION OF ATTORNEY.** When it is the duty of the attorney general to appear in an action or legal proceeding, he may authorize other members of the bar to appear for him, and pleadings or other papers executed in his

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able members of the bar of this court will not upon the sole ground that the attorney general is a public person, and with no suggestion that such appointment is not duly authorized.

CONSTRUCTION. A bequest in the following words: "I hereby will, devise and bequeath to the executors of this my last will and testament fifty thousand dollars in trust to purchase a site and build thereon a home for poor working girls, expending not more than one-half of said sum for the purchase of said site and erecting a building thereon and investing the balance in interest-bearing securities and applying the interest derived therefrom to the support of the said charity," is sufficiently specific to establish a public charity.

6. ———: CONSTRUCTION. When there are inconsistent and irreconcilable provisions in a will, the latest is generally supposed to express the intention of the testator. This rule, however, does not apply to ambiguous or apparently inconsistent words in the same sentence or provision.
7. ———: ———. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, WILLIAM A. REDICK and ALEXANDER C.
TROUP, JUDGES. *Reversed with directions.*

Smyth, Smith & Schall, for appellants.

E. Wakeley, George W. Doane, W. D. McHugh, W. H. Herdman, Charles B. Keller, Arthur C. Wakeley and W. H. De France, contra.

SEDGWICK, J.

On January 6, 1904, John A. Creighton, a wealthy citizen and well-known philanthropist of Omaha, being then a widower and childless, executed his last will and testament, containing special bequests aggregating

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\$1,150,000. By paragraphs 2 to 6, inclusive, he bequeathed to nephews, nieces and personal friends \$250,000. By paragraphs 7 to 12 he bequeathed \$900,000 to various charities. Paragraph 13 is what is commonly called the residuary clause. Paragraph 10 reads thus: "I hereby will, devise and bequeath to the executors of this my last will and testament fifty thousand dollars in trust to purchase a site and build thereon a home for poor working girls, expending not more than one-half of said sum for the purchase of said site and erecting a building thereon and investing the balance in interest-bearing securities and applying the interest derived therefrom to the support of the said charity." Paragraph 13 is as follows: "I hereby will, devise and bequeath all the rest residue and remainder of the estate real and personal of which I may die seized or possessed to the legatees and beneficiaries hereinbefore mentioned, each of them to take and have the proportion of such remainder as the bequest herein made to him or her bears to the whole of my estate."

Paragraph 14 revoked all wills theretofore made, and constituted and appointed John A. McShane, James H. McShane, John D. Creighton and John A. Schenk executors without bond. James H. McShane declined to qualify, and Mr. Schenk died prior to the trial of this case in the court below, leaving the other two gentlemen named as the executors of the will. Mr. Creighton died February 7, 1907, leaving an estate of nearly \$4,000,000. A number of nephews and nieces, who have been denominated the "unnamed heirs," were not mentioned in the will. It would appear from the record that they determined to offer no contest to the probating of the will, but to obtain their rights, if any they had thereunder, by a construction of the same. The will was therefore admitted to probate March 16, 1907. October 1, 1907, the unnamed heirs filed a petition in the county court for the construction of certain clauses of the will, including the tenth and thirteenth clauses, above set out, in which

petition they made the executors and legatees under the will defendants. The county court entered an order requiring the parties named in the petition and all persons interested to show cause why the prayer of the petition should not be granted. A decree was entered in the county court construing the will and holding the tenth clause, above set out, to be void and incapable of execution. The executors appealed to the district court. The unnamed heirs filed in the district court their petition praying for a construction of clauses 10 and 13 of the will, above set out. A petition of intervention in the name of the attorney general was filed in the district court on relation, as alleged, of Catherine B. McCarthy, and two others, and on his own behalf as attorney general, and on behalf of the people of the state of Nebraska, alleging that the charity and trust under the tenth clause of the will were of a public nature, in which the people of the state were interested, and that it was the right and duty of the attorney general to appear in the matter, for the purpose of protecting the said charity and trust; and that the relators were poor, working girls, having a right to intervene and appear in the case, as beneficiaries, through the attorney general. A motion was filed by the unnamed heirs to strike the petition of the attorney general from the files, for the reason that neither he nor the state nor the relators were parties to the suit, and had no rights or interest entitling them to intervene in the case pending on appeal from the county court. An amended petition of intervention was filed in the name of the attorney general, reciting that he appeared as set out in the original petition, and adding that the appearance was by request of the governor of Nebraska. In this amended petition the same claim is made as in the original petition, and it further relates that the executors and trustees "have failed to demur to or answer said petition or the contentions and claims made therein;" that the cause was docketed in that court March 12, 1908, and in the usual course of the business of the court would have been

reached and tried more than a year sooner if it had been pressed with due diligence by the executors. It then sets out the interest of the executors as stated in the original petition, and alleges that the financial interest of the trust and charity and of the beneficiaries thereunder is not in harmony with the financial interest of the executors and trustees, but is opposed thereto; that on October 5, 1909, they filed in the probate court a petition, "representing that a proposition of compromise had been made, proposing to give the executors \$75,000 and the heirs \$85,000 of the \$160,000 in controversy, their counsel advising them that the litigation might be prolonged for several years, preventing or delaying the final closing of the estate, and the establishing and organizing of the home for working girls, and averred that they presented these facts to the court without recommendation, praying the court to advise and instruct them as to what action, if any, they should take as executors with reference to the proposition." This petition of intervention was signed, "William T. Thompson, Attorney General of the state of Nebraska, by Smyth, Smith & Schall, his attorneys, who are also attorneys for relators." The petition is verified by Mr. Smyth. On the same day Messrs. Smyth, Smith & Schall filed a separate petition of intervention for the three ladies named as relators in the petition of intervention which they had filed for the attorney general. A motion was filed to strike from the files the amended petition of the attorney general. A demurrer was filed to his amended petition, and a like demurrer to the petition of the three ladies named. The motion and the demurrer to the petition were both overruled. On the same day the motion to strike the petition of intervention of McCarthy, Brown and St. Onge was sustained and their petition stricken from the files. The executors filed an answer to the petition of the unnamed heirs. The case was tried and argued to the Honorable Lee S. Estelle, the Honorable A. C. Troup and the Honorable W. A. Redick, sitting together as judges of the district court for Douglas county.

The three judges of the district court above named, construing the latter part of the thirteenth paragraph literally, entered a decree sustaining the tenth paragraph of the will, and adjudged that under that paragraph and paragraph 13 the executors, as trustees and in trust for the purpose as set out in paragraph 10, were entitled to take \$88,426.34 in satisfaction of said legacies and interest, and that the sum of \$79,256.83 be paid by the executors to the heirs at law of John A. Creighton, deceased, share and share alike. Two motions for a new trial were filed in the name of the attorney general, two by the executors, and one by the unnamed heirs, and all were overruled. No motion for a new trial was filed by the interveners, McCarthy, Brown and St. Onge. An appeal bond was filed in the district court in the name of the attorney general, and within the time provided by law the attorney general caused a transcript to be filed in this court, and notice of appeal was duly given. The unnamed heirs and the executors filed their cross-appeals. After the appeal had been lodged in this court appellees (the unnamed heirs) moved to dismiss the appeal upon several grounds. The case was heard and an opinion rendered, which will be found reported in 88 Neb. 107, 113. The motion to dismiss was at that time overruled, all of the grounds urged in said motion being considered and decided, except the one that the attorney general had no authority to intervene in the case or to prosecute an appeal to this court. As to that point we said: "The appellees assert that the attorney general has no authority to intervene in the case or to prosecute an appeal to this court. The briefs and arguments upon these propositions are so meager that we shall reserve the question for consideration in disposing of the case upon its merits."

In their brief and in their oral argument at the bar appellees renew their contention that the district court for Douglas county erred in overruling their motion to strike the petition of intervention of the attorney general, and in allowing him to intervene in said cause in

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the district court; that the district court erred in overruling their demurrer to the petition of intervention of the attorney general; that the attorney general, "*solo appellant herein*, has no interest, direct or indirect, of a beneficial or pecuniary character in the subject matter in litigation herein, and therefore is not, and cannot, be prejudiced by any decree or judgment entered herein in the district court for Douglas county, Nebraska, and hence possesses no right of appeal therefrom to this court."

It is contended by the appellees that neither the state nor the people of the state nor the attorney general in his official capacity had any such interest in the charity sought to be established by the tenth paragraph of the will, as would have entitled the attorney general to appear at any stage of the proceedings; and, further, that, even if he might properly have appeared before trial in the county court, he could not do so after there had been a full and complete trial in that court and the case taken to the district court on appeal. This, for two reasons: First, that the order of the county court, entered October 4, 1907, for all persons, claiming any interest in the controversy, to appear and answer on or before the 28th of that month, operated as a bar to any right on the part of the attorney general to appear thereafter; and, second, that the intervention, if permissible at all, should have been made in the court of original jurisdiction—the county court. Section 9489, Ann. St. 1911, provides: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any other court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party, or interested." Section 4778 provides: "It shall be the duty of the attorney general to appear and defend actions or claims against the state. He may require the assistance

of the district or prosecuting attorney of the district or county wherein the action is brought, and in any case of importance or difficulty the governor or chief officer of the department or institution to which it relates may retain and employ a competent attorney to appear on behalf of the state." The attorney general has not objected to the appearance of these attorneys in his name, and is not now questioning their right to so appear; but, on the other hand, it seems that they are appearing with his approval. It is clear that the objection to their authority to represent the attorney general in this matter is not well taken.

The executors asked for the opinion of the court whether the will should be construed to give the whole estate to the beneficiaries named, including the charity named in the tenth paragraph, or those beneficiaries should take only a portion of the remainder of the estate, leaving a part to be distributed, as an intestate estate, to the legal heirs of the testator. It would seem proper for them to refuse to contend for either side of the controversy, and that made it necessary that the interests of the proposed charity should be represented, since the so-called unnamed heirs were vigorously insisting upon a construction favorable to them. Upon the principles and reasoning of *State v. Pacific Express Co.*, 80 Neb. 823, and *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669, we think it was the duty of the attorney general to represent the interests of this charity. See, also, *Chambers v. Baptist Educational Society*, 1 B. Mon. (Ky.) 215; *Rolfe and Rumford Asylum v. Lefebvre*, 69 N. H. 240; *Women's Christian Ass'n v. Kansas City*, 147 Mo. 103; *Going v. Emery*, 16 Pick. (Mass.) 107. In *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, it was said: "The provisions for the administration of charitable trusts under the statute of 43 Elizabeth *held* not to be in force in this state. The doctrine of administering trusts for charitable uses *cy pres*, or under the prerogatives of the king as *parens patriæ* by his sign-manual, is inapplicable

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and has no part or place in the administration of the courts, either at law or in equity, in this state." This relates to the manner of administering the trust, and, as is held in the same case, "where a certain and ascertainable trustee or trustees are appointed, with full power to select the beneficiaries or designate the objects of the charity, and devise a plan for the application of the funds bestowed, the court will, through the trustee, execute the charity." Here the right of this public charity to exist is assailed, and such duties as general executors under the will are imposed upon the trustees as render it embarrassing for them to contend for the claims of either party as against the other. In such case it is the duty of the attorney general to appear in support of the charity.

The brief of the so-called unnamed heirs presents unquestioned authorities to support the proposition that the decree of the probate court in the settlement of estates upon matters within the jurisdiction of that court are final, unless appealed from, and cannot be collaterally attacked. It was perhaps unnecessary to cite authorities upon so plain a proposition, but that does not determine the question of the right to appear in the district court after the case has been appealed. *Blatchford v. Newberry*, 100 Ill. 484, and other similar cases, are cited, and upon these authorities it is contended that no party could appear in the case in the district court who had not appeared in the probate court. In the Illinois case it is decided that, "if there are interests such as would make it proper for other parties to intervene in the cause, such intervention must begin in the court of original jurisdiction, and cannot be allowed in this court." What that court decided was that new parties could not appear and present new issues in the appellate court. This, however, does not decide the question that is before us. The proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*. Every one interested is a party in the probate court, whether he is named or not, and this is particularly true as to the question of the dis-

tribution of the estate. Under our statute it is not necessary to give any notice of the hearing upon the distribution of the assets of the estate. Everybody interested in that distribution is a party to the proceeding, whether he has appeared in the probate court in the proceeding or not, and so, if the state, in behalf of this charity, was interested in the distribution of the assets in the probate court, it was necessarily a party before that court, whether it appeared there or not. The court was acting upon the *res* of the estate, and not upon the persons interested in it. Therefore, it seems to follow that, when an appeal was taken by the executors to the district court, it removed the whole case to the district court, and all parties interested in the distribution were necessarily parties there and entitled to be heard.

The question of the validity of the tenth clause of the will is not as extensively discussed in the briefs as other questions are. It gives the trustees named a sum of money and directs them to purchase a site and build a house which it designates as a charity "for poor, working girls." It directs that they shall invest a certain specified proportion of the available funds in interest-bearing securities, and that they shall support the "charity," and shall use the interest derived from the securities for such support. While it leaves the details to the discretion of the trustees, it is sufficiently specific to establish the charity intended and place the general management and control in the hands of the trustees. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796; *Chick v. Ives*, 2 Neb. (Unof.) 879; *St. James Orphan Asylum v. Shelby*, 75 Neb. 591; *In re Estate of Nilson*, 81 Neb. 809.

The principal contention in this case is as to the construction and meaning of the thirteenth clause of the will. It is generally considered that one who makes a will intends to dispose of his property thereby. A will which makes defined bequests and devises to individuals and persons named, and contains a general residuary clause, will, as against collateral heirs, be held to dispose

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of all of the property of the estate, unless the contrary appears from the language of the will itself. When there are inconsistent and irreconcilable provisions in a will, the latest is generally supposed to express the intention of the testator. This rule, however, does not apply to ambiguous or apparently inconsistent words in the same sentence or provision.

The thirteenth provision of the will expresses the intention to dispose of the remainder of the estate not included in the specified legacies and devises. It gives this remainder to the "legatees and beneficiaries" mentioned in the will. The testator was aware that he had not included all of his property in the specified amounts. He intended that all of the beneficiaries named should participate in the remainder. How much should each beneficiary take? He had already fixed the proportion that each should take of that part of his estate disposed of by the prior provision of the will. Did he intend that these respective legatees and beneficiaries should take the remainder in the same proportion? In this very clause he gives them the whole of this remainder. He must have used the words, "the bequest herein made," with that fact in mind. He had given this legatee a specified sum and a share in the remainder, and this gift would bear a certain proportion to the whole estate. He had also given each legatee a specified sum and a share in the remainder which would bear the same proportion to the whole estate. It would, of course, follow that the specified sum given to each legatee would bear the same proportion to the sum of the legacies specified that the entire gift to each legatee would bear to the whole estate. The amount of the legacies specified in the former provisions of the will was \$1,150,000. This legatee had already been given one twenty-third of that amount, and would take the same proportion of the whole estate, and necessarily the same proportion of the remainder. We recognize this is not giving a literal construction to the last few words of this provision. "The proportion of such

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remainder as the bequest herein made to him or her bears to the whole of my estate" is not literally equivalent to the proportion of such remainder as the bequest hereinbefore made to him or her bears to the sum of the bequests hereinbefore made. These words of the will, if taken by themselves, would more naturally have the meaning contended for by the unnamed heirs; but, construing these words with the clause in which they stand and in the light of the whole will, the construction stated presents less difficulty.

The judgment of the district court is reversed and the cause is remanded, with directions to enter a decree distributing the whole estate to the same legatees and in the same proportions that the \$1,150,000 of the specified bequests was distributed to the beneficiaries specified in the will, giving to the trustees of the charity named in the tenth clause of the will one twenty-third part of the whole estate.

REVERSED.

FAWCETT, J., dissenting.

I am unable to concur in the majority opinion, for the reason that I do not think any of the parties are entitled to a review by this court of the judgment entered in the district court.

When the unnamed heirs filed their petition in the county court, for a construction of the will, that court entered an order requiring the parties named in the petition "and any and all other person or persons having or claiming to have any right, title or interest, actual or contingent," in the estate or in the assets of the estate, either as heir, legatee, beneficiary, trustee, or otherwise, to answer and show cause on or before the 28th day of October, 1907, why the prayer of said petition should not be granted; providing that in default of such answer "said parties, and each of them, and all other person or persons shall be forever barred from any and all right, title, interest," etc., and that notice of the order be pub-

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lished for three consecutive weeks in the "Examiner," a weekly newspaper published in and for Douglas county, Nebraska. October 19, 1907, due proof of publication of the above order was made. February 17, 1908, a decree was entered in the county court construing the will and holding the tenth clause to be void and incapable of execution. March 12, 1908, the executors filed in the district court a transcript on appeal. May 29, 1909, the unnamed heirs filed in the district court their petition praying for a construction of clauses 10 and 13 of the will. June 14, 1909, the executors filed a motion to strike the petition of the unnamed heirs, on the ground that it raised other and different issues from those tendered and determined in the county court. This motion stood undisposed of until November 27, 1909, when leave was given the executors to withdraw their motion to strike and to plead by December 6, 1909. During the interim between the filing of this motion and the withdrawal of the same, and on October 25, 1909, a petition of intervention in the name of the attorney general was filed, as stated in the majority opinion. On March 27, 1909, a motion was filed by the unnamed heirs to strike the petition of the attorney general from the files, for the reason that neither he nor the state nor the relators were parties to the suit and had no rights or interest entitling them to intervene, and that the case was now pending in that court on appeal from the county court. November 3, 1909, an amended petition of intervention was filed in the name of the attorney general, as stated in the opinion. On July 15, 1910, an appeal bond was filed in the name of the attorney general. On July 21, 1910, an appeal in the name of the attorney general was filed in this court. December 17, 1910, the unnamed heirs filed a cross-appeal, and on December 21, 1910, the executors filed their cross-appeal. After the appeal had been lodged in this court, appellees (the unnamed heirs) moved to dismiss the appeal upon several grounds, which motion was disposed of as stated in the majority opinion.

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In their brief and in their oral argument at the bar, appellees renew their contention that the district court for Douglas county erred in overruling their motion to strike the petition of intervention of the attorney general, and in allowing him to intervene in said cause in the district court; that the district court erred in overruling their demurrer to the petition of intervention of the attorney general; and insist that the attorney general, "*sole appellant herein*, has no interest, direct or indirect, of a beneficial or pecuniary character in the subject matter in litigation herein, and therefore is not, and cannot, be prejudiced by any decree or judgment entered herein in the district court for Douglas county, Nebraska, and hence possesses no right of appeal therefrom to this court."

This contention, which meets us at the very threshold of the case, is sound and should be sustained. It is contended by the appellees that neither the state nor the people of the state nor the attorney general in his official capacity had any such interest in the charity, sought to be established by the tenth paragraph of the will, as would have entitled the attorney general to appear at any stage of the proceedings; and, further, that, even if he might properly have appeared before trial in the county court, he could not do so after there had been a full and complete trial in that court and the case taken to the district court on appeal. Section 9489, Ann. St. 1911, provides: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any other court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party, or interested." Section 4778 provides: "It shall be the duty of the attorney general to appear and defend actions or claims against the state. He may

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require the assistance of the district or prosecuting attorney of the district or county wherein the action is brought, and in any case of importance or difficulty the governor or chief officer of the department or institution to which it relates may retain and employ a competent attorney to appear on behalf of the state." It is thus made the duty of the attorney general to himself appear in all of the matters included within the sections above quoted. No power is given him anywhere in the statute to delegate his duties to private counsel. If that necessity ever arises, section 4778 prescribes who may retain such counsel. Moreover, in the present case, so far as the record before us discloses, the attorney general himself never actually appeared at any stage of the proceedings. He did not sign or verify either the original or amended petition of intervention. He did not sign the motion for a new trial, nor the appeal bond, nor the briefs filed in this court, nor did he appear upon the oral argument at the bar to argue the case. All of these things were done in his name by the private counsel who appeared for the interveners, McCarthy, Brown and St. Onge. It is apparent that counsel were in doubt as to their ability to establish the right of the three ladies named to file a petition of intervention, and that the name of the attorney general was borrowed by them with the thought that, if they failed to establish the right of their private clients, they might succeed under the protecting name of the attorney general. This the statute does not authorize.

After a careful examination and consideration of the will and the record of the case as it then stood, together with the amended petition of intervention, upon which the case went to trial in the court below, it seems clear to me that there was nothing to justify the appearance of the attorney general in that controversy. Upon this point I think:

1. That, under the tenth clause of the will set out, it cannot be held that the charity thereby sought to be

established was clearly a public charity. Treating that clause as valid, as contended for by the intervener, there is nothing in the wording of it to indicate that it was the intention of the testator to make it a public charity. The bequest was to his executors in trust, and the direction was that, with the fund thus bequeathed to them, they were to purchase a site and build thereon a home for poor, working girls, expending not more than one-half of the bequest for the purchase of the site and erection of the building, and to invest the balance in interest-bearing securities, and to apply the interest derived therefrom to the support of said charity. Were the working girls to be received in this home free of all charge, or should they be required to pay a modest consideration for the use of the home? Could any poor, working girl, whether worthy or not, demand admission to the home? Were their qualifications for admission to be passed upon by some public official, or by the trustees named in the will? Was the home thereafter to depend upon public taxes for support, or was it the intention of the testator, with the aid of the interest upon one-half of the bequest, and the receipts of the home from those who might be admitted, to make the home self-supporting? In short, I think the charity thus attempted to be created was in every essential a private, and in no respect a public, charity. I do not think the attorney general had any more right to intervene in behalf of that charity than he would have had to intervene for the Creighton College, which received \$500,000, or the St. Joseph Hospital, which was to be the beneficiary of \$200,000. In *Attorney General v. Soule*, 28 Mich. 153, it is held: "The state is not authorized, through its law officer, to bring a suit in equity, adverse to all private parties and interests, to enforce a gift by will to charitable uses, unless the gift be definitely to a charity such as equity recognizes, and definitely to a public charity. The state, no less than other prosecutors, must appear on the face of the record to be entitled to prosecute, or the proceeding

must fail in consequence of the irrelation of the plaintiff to the subject of the action." "The question is, not," says Sir William Grant, in *Morice v. Bishop of Durham*, 9 Ves. Jr. (Eng.) *399, "whether the trustee *may* not apply it upon purposes strictly charitable, but whether he is *bound* so to apply it." And in *James v. Allen*, 3 Mer. (Eng.) 17, he says, further: "If the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." As said by the Michigan court: "If the ambiguity involves the quality of the charity as public or private, the same reasons and principles must apply, where the right to maintain the suit depends upon its being public, and if the fund may consistently with the will be applied to a purpose not public, the attorney general cannot interpose to compel a public application."

Mr. Creighton was known as a devout Catholic. It is a matter of public notoriety that his benefactions to the institutions of that denomination had been so great, that he had been invested with a title by the Pope. The two gentlemen named as trustees are also well known to be prominent members of that church. His confidence in them was such that he named them executors without bond. He imposed only two restrictions upon them as trustees—one that the site and building should not cost more than half of the bequest, and the other that the remainder should be invested for the support of the home to be established by them. Everything else in connection with the scheme he had in mind, as to the establishment, and the management of the home when established, was left in the hands, and consequently to the judgment, of the trustees. If they, knowing the testator's love for his own denomination, and in view of the fact that all of the other charities made beneficiaries by the will were under the control of various Catholic organizations, saw fit to admit to that home none but poor, working girls of the Catholic church, they clearly would be within the clause

of the will under consideration. Would such a home be considered a public charity, such as would warrant intervention by the state? Clearly not. If, then, the fund bequeathed might consistently with the will be applied to such a home, it cannot be held that the trust created was for a "definitely" public charity, and, hence, it is too indefinite to warrant intervention by the state.

2. If the attorney general had a right to intervene in this controversy, could he wait until the case had been fully tried and decided in the county court, and until the executors had prosecuted their appeal to the district court, and then intervene in that court? Section 50a of the code provides: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." In *Reischick v. Rieger*, 68 Neb. 348, we held that the county court has exclusive original jurisdiction of all probate matters, that the construction of a will is a probate matter, and that in such matters the district court has no original jurisdiction. In the light of this holding, the soundness of which cannot be questioned, the district court, in a case of the kind under consideration, is an appellate court; and I do not think the fact that upon such appeal it tries the case *de novo* in any manner changes the situation. The case in that court must be tried upon the same issues presented and between the same parties who appeared in the court of original jurisdiction—the county court. The attorney general, like all others claiming any interest in the construction of the will under consideration, was bound to

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know of the pendency of the proceeding in the county court. He was chargeable with the notice given by the county court to appear and assert his contention on or before the date named in such notice. He failed to do so, but waited, not simply until the trial commenced, but until the case was finally determined in that court, and until an appeal had been prosecuted therefrom to the district court, before attempting to intervene. In *Blatchford v. Newberry*, 100 Ill. 484, in the fourth paragraph of the syllabus, it is held: "In a cause brought to this court by appeal, none save such as are parties to the record in this court have a right to be heard. If there are interests such as would make it proper for other parties to intervene in the cause, such intervention must begin in the court of original jurisdiction, and cannot be allowed in this court." In the opinion, beginning on page 492, it is said: "The attorney general asks leave to join in this application, and insists that the public have interests involved in this cause, and he urges a rehearing that he may have an opportunity to assert, support and vindicate the same. We are of opinion that in a cause brought here by appeal, none save such as are parties to the record in this court have a right to be heard. If the interests of the public be such that the attorney general may properly intervene in this litigation, we think such intervention must begin in the court of original jurisdiction, and cannot be allowed here." The fact that in that case the circuit court was the court of original jurisdiction, and that the attempted intervention was in the supreme court, does not make the case different in principle from the case at bar. I think that in this case the attorney general had no more right to intervene in the district court, after the case had been adjudicated in the court of original jurisdiction and appealed to that court, than he would have to intervene in this court, had he waited until the appearance of the case here. In *Cowan, McClung & Co. v. Lowry*, 75 Tenn. 620, in the first paragraph of the syllabus, it is held: "Where a garnishee

appeals from a justice's judgment against him, it is error in the circuit court to allow the judgment debtor to intervene, on his motion, as a defendant in the garnishment proceedings. His remedy was to appeal from the judgment." In *Henry, Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Ia. 33, it is said: "The right to intervene is purely a statutory right, and it must be exercised at the time, and in the manner, the statute prescribes." In *Chase v. Evoy*, 58 Cal. 348, 355, it is said: "The right to intervene is purely statutory, and the statute prescribes the mode of exercising it." In *Fischer v. Hanna*, 8 Colo. App. 471, 485, the above extract from *Chase v. Evoy* is quoted with approval. I think the attempted intervention was too late.

3. In addition to what has been said upon this question, I think it clearly appears from the record that there was no necessity for intervention either by or in the name of the attorney general at the time such intervention was made. At every stage of this case, since the will was filed for probate, the executors have been represented by able counsel, who appears to have at all times honestly and ably attempted to have every provision in the will of Mr. Creighton sustained and his large estate distributed as therein directed. It further appears that at all times the executors have followed his advice and acted under his directions. If the executors had been consulting their own financial interests, they would not have appealed from the judgment of the county court, as the decree of that court would have afforded them ample protection in distributing the fund covered by the tenth paragraph of the will. The fact that, after they had appealed, they submitted to the county court a proposition of compromise which had been made to them by the unnamed heirs is no evidence of any intention on their part to further their own private interests at the expense of the trust fund. To my mind, it is the very reverse of that. The questions contended for were far from being clear either way, and the executors would have as much reason

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to expect that the judgment of the county court would be affirmed on appeal as they would have to believe that it would be reversed, and, if affirmed, they would participate in the distribution of the entire fund. Instead of refusing the offer of compromise upon their own responsibility, they did just what any honorable executors would have done under like circumstances, viz., submitted it to the county court for its instruction. While this was pending, they did not fail to protect their rights in the district court. In the amended petition of intervention, it is said that the executors had "failed to demur to or answer said petition." The record shows, however, that, while this statement may be technically true, in the sense that they had not filed any paper denominated a "demurrer" or "answer," they had, as a matter of fact, filed a motion to strike the petition upon grounds which were in no manner frivolous. This motion, until disposed of, would stay all proceedings under the petition as effectually as a demurrer. The motion was filed within less than three weeks after the filing of the petition. The date of the filing is June 14, 1909, just on the eve of the summer vacation, which is taken annually by that court. The motion filed by them had not been passed upon when the court adjourned for that term. When the first petition of intervention was filed, the October term of the district court had been in session less than one month. The executors' motion to strike had not yet been passed upon. The petition of intervention does not disclose any facts indicating that, from the time of the filing of their motion to strike, on June 14, to the time the petition of intervention was filed, on October 25, the executors or their attorney had been guilty of any negligence, or that the delay in acting upon the motion was due to either their intentional neglect or indifference. After the attorney general filed his petition of intervention, thereby joining issue with the petitioners, and thus waiving the right, so far as intervener was concerned, to insist upon the motion to strike, counsel for the executors obtained

leave to withdraw the motion and to plead within ten days thereafter, within which time an answer was filed vigorously assailing the petition of the unnamed heirs on every point. It therefore appears that the executors, from the time their appeal was lodged in the district court until the final hearing, were never in default of a pleading for a single moment of time, but were following up their appeal with all reasonable diligence. The record upon its face shows an entire absence of any necessity for intervention by or for the attorney general. Viewed from any standpoint, I am unable to discover any right or justification for this intervention.

4. The attempted appeal of the attorney general was in his name alone, and did not purport to be for the relators McCarthy, Brown and St. Onge. Had it done so, it could not have availed them anything, for the reason that more than six months had elapsed from the entry of the judgment dismissing their intervention and the filing of the appeal in this court. Hence, they could not, under any circumstances, have any standing here. *Harman v. Barhydt*, 20 Neb. 625; *Shold v. Van Treeck*, 82 Neb. 99.

5. The cross-appeal filed by the unnamed heirs and the like appeal filed by the executors were both filed more than six months after the entry of the judgment in the district court, and hence have no standing in this court as independent appeals. The only standing either of them ever had was as a cross-appeal. They therefore relied for life and standing in this court upon the original appeal. With that prop removed, eliminated from the case, the cross-appeals have nothing to attach to or rest upon. As they followed the original appeal into court, they should follow it out of court. The only right of appeal from a judgment of the district court to this court is to be found in section 675 of the code, which provides that a transcript shall be filed in this court within six months after the rendition of the judgment or decree, or within six months from the overruling of a motion for a new trial. In *Farrar v. Churchill*, 135 U. S. 609, the

lished for three consecutive weeks in the "Examiner," a weekly newspaper published in and for Douglas county, Nebraska. October 19, 1907, due proof of publication of the above order was made. February 17, 1908, a decree was entered in the county court construing the will and holding the tenth clause to be void and incapable of execution. March 12, 1908, the executors filed in the district court a transcript on appeal. May 29, 1909, the unnamed heirs filed in the district court their petition praying for a construction of clauses 10 and 13 of the will. June 14, 1909, the executors filed a motion to strike the petition of the unnamed heirs, on the ground that it raised other and different issues from those tendered and determined in the county court. This motion stood undisposed of until November 27, 1909, when leave was given the executors to withdraw their motion to strike and to plead by December 6, 1909. During the interim between the filing of this motion and the withdrawal of the same, and on October 25, 1909, a petition of intervention in the name of the attorney general was filed, as stated in the majority opinion. On March 27, 1909, a motion was filed by the unnamed heirs to strike the petition of the attorney general from the files, for the reason that neither he nor the state nor the relators were parties to the suit and had no rights or interest entitling them to intervene, and that the case was now pending in that court on appeal from the county court. November 3, 1909, an amended petition of intervention was filed in the name of the attorney general, as stated in the opinion. On July 15, 1910, an appeal bond was filed in the name of the attorney general. On July 21, 1910, an appeal in the name of the attorney general was filed in this court. December 17, 1910, the unnamed heirs filed a cross-appeal, and on December 21, 1910, the executors filed their cross-appeal. After the appeal had been lodged in this court, appellees (the unnamed heirs) moved to dismiss the appeal upon several grounds, which motion was disposed of as stated in the majority opinion.

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In their brief and in their oral argument at the bar, appellees renew their contention that the district court for Douglas county erred in overruling their motion to strike the petition of intervention of the attorney general, and in allowing him to intervene in said cause in the district court; that the district court erred in overruling their demurrer to the petition of intervention of the attorney general; and insist that the attorney general, "*sole appellant herein*, has no interest, direct or indirect, of a beneficial or pecuniary character in the subject matter in litigation herein, and therefore is not, and cannot, be prejudiced by any decree or judgment entered herein in the district court for Douglas county, Nebraska, and hence possesses no right of appeal therefrom to this court."

This contention, which meets us at the very threshold of the case, is sound and should be sustained. It is contended by the appellees that neither the state nor the people of the state nor the attorney general in his official capacity had any such interest in the charity, sought to be established by the tenth paragraph of the will, as would have entitled the attorney general to appear at any stage of the proceedings; and, further, that, even if he might properly have appeared before trial in the county court, he could not do so after there had been a full and complete trial in that court and the case taken to the district court on appeal. Section 9489, Ann. St. 1911, provides: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any other court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party, or interested." Section 4778 provides: "It shall be the duty of the attorney general to appear and defend actions or claims against the state. He may

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The only case we have found, which is at all adverse to the views above set out, is *Feder v. Field*, 117 Ind. 386, where it is held: "The dismissal of an appeal by the appellant does not carry the case so far as it is affected by an assignment of cross-errors. The code makes no provision for the assignment of cross-errors by the appellee, but the practice has been so long recognized that it has become one of the unwritten rules of procedure." In that case the question as to whether the cross-errors were filed before or after the expiration of the time allowed by statute for appeal was not raised, and hence the case cannot be considered as an authority upon that point. If it had been made to appear that the cross-errors were assigned after the time within which appellees could affirmatively have obtained a standing in court, it seems to me the Indiana court would have been compelled to hold as was held by the United States supreme court in *Farrar v. Churchill*, *supra*.

The motion of appellees to dismiss the appeal prosecuted in the name of the attorney general should be sustained and the appeal dismissed. The cross-appeals of the executors and of the appellees should likewise be dismissed.

BARNES, J., concurs in the above dissent.

REESE, C. J., concurring in dissent.

I concur in this dissent upon the ground that the application to intervene was not made within the time required by the section of the statute quoted in the dissenting opinion, and therefore the attorney general never had any right to be heard. The statute is plain that intervention must begin in the court of original jurisdiction, and cannot be allowed in an appellate court to which, after judgment, the cause has been appealed. Having had no standing in the district court, the intervention has none here.

As to whether it was the purpose of the testator to

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create a public or private charity, I do not find it necessary to express an opinion. As applied to this case, the authorities are not entirely harmonious.

BARBORA ZITNIK, ADMINISTRATRIX, APPELLEE AND CROSS-APPELLANT, v. UNION PACIFIC RAILROAD COMPANY, APPELLANT; JOHN J. MULLEN, CROSS-APPELLEE.

FILED JUNE 12, 1912. No. 17,015.

1. **Corporations: ACTION FOR DAMAGES: VERDICT: EVIDENCE.** If a corporation and its employee or agent are sued jointly for damages alleged to be caused by negligence of the defendants, and there is a general verdict in favor of the employee and against the corporation defendant, the verdict cannot be sustained without evidence that employees or agents of the corporation other than the one so exonerated were guilty of negligence which was the proximate cause of the injury.
2. **Negligence: ACTION: PLEADING AND PROOF.** If the petition in an action for damages charges the defendants with certain acts of negligence, the proof must agree with the allegations, and the jury is not at liberty to infer that the defendants were negligent in other matters not alleged.
3. ———: **LAST CLEAR CHANCE.** The rule of "the last clear chance" implies that the one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him, but his testimony that he did not have such knowledge is not conclusive. Such knowledge may be shown by proof that the person injured was in a situation of imminent danger and so situated that the one injuring him, if he used his senses as human beings ordinarily do, must have known the danger.
4. ———: ———: **EVIDENCE.** The fact that the person injured was in a situation of danger and so situated that he could have been observed by the defendant must be proved by a preponderance of the evidence. The jury is not at liberty to estimate the probabilities in that regard without substantial proof.
5. **Appeal: INCONSISTENT VERDICT.** A verdict inconsistent with itself must be set aside upon application of all parties prejudiced thereby.

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6. ———: **REVERSAL: REMAND.** The jury having found that the engineer in charge of the engine which killed the deceased was not negligent, and there being no evidence of negligence on the part of any other agent or employee of the defendant company, the plaintiff and the defendant company having both appealed, the judgment of the district court is reversed and the cause remanded.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed.*

John A. Sheean, for appellant and cross-appellee.

Smyth, Smith & Schall, contra.

SEDGWICK, J.

Plaintiff, as administratrix of the estate of her deceased husband, John Zitnik, commenced her suit in the district court for Douglas county against the defendants Union Pacific Railroad Company and John J. Mullen, to recover damages for the death of said John Zitnik, alleged to have been caused by the negligence of defendants. It is alleged that defendant Mullen was a locomotive engineer and in charge of a locomotive switch engine in use in the track yards of the company, and the decedent was an employee of said company, his duties, at the time of the alleged accident, being to keep the switches and tracks of the company in said yards clear of obstructions, and in which duties he was thus engaged; that on the 30th day of January, 1909, while Zitnik was engaged in said duties, and about the hour of 11 o'clock A. M., the defendants negligently caused a locomotive switch engine, belonging to defendant company, to move against, upon and over said Zitnik, thereby negligently inflicting injuries upon him from which he soon thereafter died.

The defendants filed separate answers to the petition, that of the company being: First, a general denial of all unadmitted allegations; second, an admission that Zitnik was killed at the time and place alleged; but denies that

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"defendants, or either of them, negligently and carelessly, or without regard for the safety of said John Zitnik, caused a locomotive switch engine, belonging to the defendant railroad company, to move against, upon and over the said John Zitnik, thereby negligently and carelessly inflicting upon him the injuries which caused his death, but does not deny that the body of said John Zitnik was run over by a locomotive switch engine of defendant railroad company, of which defendant John J. Mullen was engineer." It is alleged that the decedent was guilty of contributory negligence. The defendant Mullen filed his separate answer, which was, in substance, the same as the answer of the railroad company. Plaintiff replied denying the contributory negligence of the decedent. Later, defendant company amended its answer, in which it is alleged, in substance, that the action was brought under the provisions of sections 10591 to 10593, inclusive, Ann. St. 1911, commonly known as the "Employers' Liability Law," and questioning the constitutionality of said sections. By these pleadings all question of the death of Zitnik by being run over by the switch engine of defendant railroad company is eliminated, and it is admitted that he was "run over by a switch engine" on the date named, and that he died on the same day, the only issue referring to his death being as to the negligence of defendants, and the contributory negligence of the decedent.

A jury was had, and at the close of the evidence the defendant Mullen moved the court for a peremptory instruction to the jury to return a verdict in his favor. The motion was overruled. Thereupon the defendant company presented a similar motion, which was overruled. The two defendants then joined in a similar motion on the same grounds, which was also overruled. To these rulings exceptions were separately taken. The jury returned a verdict in favor of defendant Mullen, and against the railroad company in favor of plaintiff, for the sum of \$9,600. A motion for a new trial was

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filed by defendant company. Plaintiff also moved for a new trial as against defendant Mullen. Both motions were overruled, when defendant company moved the court for a judgment in its favor notwithstanding the verdict. This motion was also overruled, and judgments were entered in accordance with the findings of the jury.

It appears from the evidence that Zitnik was one of the trackmen laboring on the tracks and switches in the yards of defendant. The 30th day of January, 1909, the day of the accident, was a cold day, the temperature being one degree below zero, and the wind blowing from the northwest at the rate of 22 miles an hour. During the forenoon the foreman directed Zitnik to go and examine the tracks and switches and report their condition. He went as directed, and soon thereafter returned and reported that there was some accumulation of snow in the switches. He was then directed to clean the switches of the accumulated snow. (There was little snow on the ground, but sufficient to be blown and packed in and about the switches.) He left the foreman for the purpose of discharging the duties imposed, and was seen later upon the tracks in the vicinity of the place where he was killed, but probably an hour or so before the accident. The first account we have of the engine on that day was just before the accident, when it was standing on one of the tracks near the Tenth street viaduct, headed west, and in charge of the engineer, fireman, and two persons on the running-board at the rear of the tender. The engine was started to the westward on one of the many tracks, and when it arrived at the Eleventh street viaduct, one block away, it ran over and injured Zitnik to such an extent that he almost immediately died. So far as is shown by the evidence, no person saw him immediately before the accident, nor at the time it occurred, and the first that was known of it was when the rear of the tender with the foot or running-board, on which the two men were standing, passed over Zitnik's body, when they jumped off the running-board, called the attention

of the fireman, giving the signal to stop, the fireman in turn notifying the engineer, when the engine was stopped, and the body, almost lifeless, was removed from the track. Life became extinct on the way to the hospital. The engine was running at the rate of two and one-half or three miles an hour as it approached the Eleventh street viaduct where Zitnik was killed. The northwest wind against which the engine was running caused the smoke from the engine to settle on the left or south side of said engine, and at times, at least, cut off the view of the fireman. The track was level and on a slight curve to the northward, with no cuts or fills. Just prior to the start the fireman shoveled fresh coal into the fire box, this making what is called a "green fire," which emitted an increased volume of smoke. The engine bell was kept ringing. As the engine bore a little to the northward following the curve in the track, the front end shut off the view of the engineer and brought the line within sight of the fireman, except as interrupted by the smoke. Upon an examination made at the place of the accident about two hours later, Zitnik's shovel and broom were found by the track, near the place where the engine probably struck him. Near where the accident occurred, and not far from where the shovel and broom were found, there was a small pile of snow which had the appearance of having been removed the morning on which the accident happened. No person was on the running-board in front of the engine. Zitnik was killed at about 11 o'clock A. M. As to the allegations of the answer, that the accident was the result of contributory negligence on the part of Zitnik, there is no direct evidence whatever. There was no allegation of negligence of the defendants, except the allegation above quoted, that the defendants negligently caused an engine "to move against, upon and over the said John Zitnik."

The engineer, who controlled the movements of the engine, was the defendant Mullen. If it was his negligence that caused the accident he was liable, and the

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verdict must have been against him also. The jury found that there was no negligence on his part by finding a general verdict in his favor. The only other employees or agents of the defendant company that were in any way connected with the running of the engine were the fireman Walsh and the two men stationed upon the foot-board of the engine. It is not suggested by any one that the accident was due to any negligence of the men upon the foot-board. Unless the fireman was negligent, and his negligence was the proximate cause of the accident, the defendant company cannot be charged with negligence in running the engine. The only ground relied upon for imputing negligence to the fireman is derived from what is known as the doctrine of the last clear chance. If the fireman knew that Zitnik was in danger and could have saved him by the exercise of any and all reasonable means to that end, he was bound to do so, and his failure in that regard would be imputed to the defendant company. Some authorities hold that he could not be held negligent under this rule unless he knew that the deceased was in danger; others say that if he knew, or by the exercise of reasonable and ordinary care might have known, the situation of the deceased, he is charged with knowledge. Without going into refinements of definitions with regard to this element of the rule, it may be said that, while perhaps there are some unfortunate expressions in some of the numerous cases, the authorities are substantially agreed that the testimony of the person charged with negligence, that he did not have knowledge of the situation and danger of the deceased, is not conclusive. Such knowledge may be shown by evidence that the deceased was in a situation of imminent danger, and that the witness was so situated and so employed that he must, if he had used his senses as human beings ordinarily do, have known of the danger. The fireman testifies that he was looking out before the engine at the time of the accident; the engine was giving out large quantities of dense smoke; they were passing under the

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viaduct which confined the smoke and so obstructed his view, and that he did not see the deceased. His statements as to existing conditions are not disputed by any other witness, but are corroborated by several. If we conclude that, notwithstanding this evidence, the jury were at liberty to find that he might and ought to have seen a man situated upon the track, and might and ought to have informed the engineer of the danger in time so that the engine could have been stopped and the accident avoided, still the principal fact necessary to the charge of negligence is wholly wanting. There is no evidence that Zitnik was in a situation where he could have been discovered by the fireman. Zitnik had been at work in these yards; he was seen there about an hour before the accident. We have no evidence of his whereabouts from that time until he was seen behind the engine after the accident. He may have been busily employed at his work on this particular track, and, because of the cold and storm, failed to observe the approaching engine; or, as he was not expected to work long in any one place, he may have been walking down these tracks to some point where his work might be necessary, or he may have been crossing these tracks. Whether he had been upon these tracks in this situation for some time so that the fireman would have time to observe his danger, or whether he was struck the moment he stepped upon the track, is not disclosed by the evidence. The engine was moving slowly, less than four miles an hour; the bell was ringing. That he should remain at work upon this track until the engine struck him seems improbable. It seems at least equally probable that he was going to some point in the yards, and, walking against the storm, crossed these tracks diagonally. These are only conjectures, and the evidence fails to prove that the deceased was on the tracks in a dangerous situation for such a length of time that he could have been seen by the fireman looking from the cab window. It is not the "probabilities" that are to be established by a preponderance of the evidence; the fact

itself must be so established. Instruction No. 1, requested by plaintiff, was misleading. Unless the jury could find from a preponderance of the evidence that deceased was in fact in a dangerous situation where he could be seen by the fireman, they could not assume that fact as probable, and then infer that the fireman was negligent in not seeing him.

It does not appear from the abstract that the petition alleged that the defendants were engaged in interstate commerce, and, for that and other reasons, we do not find it necessary to discuss the recent very important decision of the supreme court of the United States in *Mondou v. New York, N. H. & H. R. Co.*, 32 Sup. Ct. Rep. 169, in which it appears to be held that the act of congress (U. S. Comp. St. Supp. 1909, p. 1171), entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and amendment, supersedes the laws of the states in so far as the latter cover the same field, and may be enforced in the state courts.

The verdict, therefore, against the defendant company and in favor of the engineer, there being no evidence of negligence on the part of any other agent or employee of the company in the matters alleged in the petition, is inconsistent with itself and cannot be sustained. The plaintiff and the defendant company having both appealed, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

I find it impossible to get the consent of my mind to concur in this decision. The day was bitter cold and a most disagreeable one. The decedent was ordered by his foreman to inspect and report upon the condition of the tracks and switches in the track yard, which he did, and was then told to clear the switches and tracks of any snow or other obstructions which could interfere with

their use. He went to his work and was seen and known to be within the grounds and among the tracks pursuing his work. Owing to the inclement condition of the weather, it was known that he should be warmly dressed in order to protect himself from the biting cold and high wind. Under all the conditions shown, it was necessary that care should be taken to avoid accidents. There were two switchmen employed with the engine by which decedent was killed. They were both riding upon the rear foot-board of the forward moving engine. No one was at the front. If the volume of smoke emitted from the engine was so great as to cut off the views of the engineer and fireman, there was all the more necessity that every precaution be taken. No precaution whatever was taken. No one was at the front foot-board to warn any one of the approaching engine. The engine was sent forward blindly with two switchmen at the rear who could see nothing in front, and no one in connection with the engine knew of the presence of decedent until his mangled body rolled from under the rear of the engine. It goes without saying that, had one of those switchmen been at the front of the engine, Zitnik would not have been killed. That must be self-evident to the mind of any sane and right-thinking person.

Was it negligence on the part of defendant not to employ those necessary safeguards? Whose duty was it to decide that question? If juries are to be of any practical use in the administration of justice, the solution of the question was for them. The inference of negligence, or the want thereof, from these facts rested alone with and on them, and they *should* be permitted to decide the question as to defendant's want of care. There is nothing in the evidence to show that the switchmen were under the direction of either the engineer or fireman. If not, and if there was negligence (a question for the jury), whose negligence was it? Most certainly that of the defendant company. If that is true, the release of the engineer by the jury would furnish no just ground

of the complaint by

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the employer. Was it negligence to order the man to work alone upon those switches and tracks under the conditions as they then existed? It was for the jury to say, considering all circumstances and conditions shown. There were other employees on and about those track yards who knew of Zitnik's presence on the tracks; yet no precaution was taken for his safety. True, the evidence is that the engine bell was kept ringing, but it is also shown that at the same time a train of cars was passing on a nearby track, and, considering the cold and high wind, the jury were justified in concluding that Zitnik did not hear or see the approaching engine before it ran him down. As shown by the testimony of the foreman of the gang of men with which Zitnik was connected, it was his custom and duty to warn the men of approaching cars. True, Zitnik had been sent out alone to the work on the tracks, but, under the circumstances, including this custom of the foreman, it was the province of the jury to consider this, as well as all conditions shown to have existed at the time, and arrive at their verdict upon the facts presented by the evidence. The court may be of the opinion that the uncontroverted facts are insufficient to sustain an inference of negligence, but the jury, being equally conscientious, may conclude that such an inference properly arises; the case being one where fair-minded men might arrive at different conclusions. In such case the whole matter rests with the jury. I do not say that the evidence in this case proves negligence on the part of defendant, for it is not the province of any member of the court to decide that question. It must (*should*) be left for the determination of the jury, and upon which the court should keep silent. Does the evidence tend to prove that there was negligence in running the engine as it was run without any safeguard whatever? If so, the matter does not rest with the court. In 2 Thompson, Law of Trials, sec. 1665, it is said: "The case must also *go to the jury* where, although the facts are not controverted, fair-minded men

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might differ as to whether the inference of negligence should be drawn from them." This is elementary. *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332. And the rule has been recognized and followed by this court ever since the decision of those cases. If the verdicts of juries in such causes are to be set aside under circumstances like those presented in this case, and the burden assumed by the courts, the jury arm of our jurisprudence may as well be dispensed with, as our much vaunted "trial by jury" would be nothing more nor less than "a fraud, a delusion, and a snare."

FAWCETT, J., concurs in the above dissent.

ELBERT J. LATTA, APPELLEE, v. BUTTON LAND COMPANY
ET AL., APPELLANTS.

FILED JUNE 22, 1912. No. 16,711.

1. Vendor and Purchaser: FALSE REPRESENTATIONS: RESCISSION. When, in order to induce a purchase of land, representations are made of material facts, and to ascertain their truth or falsity would require investigation, the party to whom they are made may place reliance upon them, and if deceived may be allowed to rescind the contract by a court of equity.
2. Evidence examined and *held* to support a decree of rescission.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Flansburg & Williams, for appellants.

Charles A. Robbins and *John O. Stevens*, contra.

LETON, J.

This is an action to rescind a contract for the exchange

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of certain real estate in Costilla county, Colorado, for real estate in Adams county, Nebraska, and certain notes and evidences of indebtedness. The defendant the Button Land Company is a corporation, Albert L. Button and Byron G. Button are officers of the corporation, and Elmer C. Hammond is a brother-in-law of the Buttons and an employee of the corporation. H. E. Gibson, from whom the title to the Colorado lands was conveyed to the plaintiffs, is a sister of Albert L. Button and Byron G. Button. The plaintiff Elbert J. Latta is a practicing physician, residing with his wife, M. Blanche Latta, at Kenesaw, Nebraska. The principal place of business of the Button Land Company is in Lincoln. At the time of this transaction it had local agents scattered over Nebraska, who drew the attention of prospective purchasers in their locality to the lands which the company had for sale, and who aided in gathering them into excursion parties at stated intervals. One of these agents was J. L. Templeton, a nephew by marriage of Dr. Latta, and in Dr. Latta's employ.

Dr. Latta, in the spring of 1908, desired to dispose of his Kenesaw property, and was induced by Templeton to go with him to the San Luis Valley, in Colorado, on a land selling excursion conducted by the Buttons. The party of about 25 or 30 persons occupied a sleeping car chartered by the land company. They reached Denver the next day, and spent the day in that city. The next morning they arrived at Alamosa, and went by train from there to Monte Vista, where they were met with carriages which the Buttons had in waiting. They were then driven some 30 or 40 miles over the country north and east of Monte Vista, stopping at the town of Center for lunch. This part of the valley is thickly settled and is in a high state of cultivation. The party returned to Monte Vista, where they took a train to Alamosa, and remained at a hotel there over night. The Button Land Company maintained an office in this hotel, in which was a display of agricultural products raised in the vicinity

of Mosca, a little town north of Alamosa, near which lay the land which the land company was selling. In the morning A. L. Button called the party into the office and gave each one a slip of paper with each piece of land to be shown numbered consecutively, so that when a place was reached the number would be mentioned and the land seeker could make such notes as he desired. Automobiles were provided and they were taken to see the listed lands. Their route took them to a point north and east of Mosca, thence westward to a point northwest of the town, and they returned to Alamosa without going into Mosca, though they could see a mill and elevators there. After arriving at Alamosa a written contract was made for the purchase of 320 acres of land, to be paid for by the conveyance of plaintiff's Kenesaw property and the transfer of certain specified promissory notes, which is the contract now sought to be rescinded on account of statements and representations which, it is claimed, were fraudulently made by Hammond and Button in order to induce the plaintiff to buy the lands, and upon which he relied in entering into the agreement. It is alleged, in substance, that these representations were that the actual selling price of the lands shown near Monte Vista, which were irrigated and under cultivation, was at that time \$100 an acre and upwards, and that a piece which was pointed out had actually changed hands at \$250 an acre; that it was further represented that the land near Mosca was of the same kind and character and fully as valuable for farming purposes as the land near Monte Vista, and was reasonably worth more than \$35 an acre; that the defendants had no interest in the land, except a commission for procuring a purchaser; that the Buttons themselves owned a large amount of land in Costilla county, and were holding the land for a price of \$100 an acre; that the lands were not settled and cultivated, because the same had been involved in litigation for a number of years, and for no other reason; and that a sufficient water right was attached to and appurtenant to

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the land, and would pass to the party on deed of conveyance, and that plenty of water for irrigation would be furnished under said water right.

The plaintiff alleges that all of these allegations and representations were false and untrue. He further alleges that the legal title to the lands appeared to be in one H. E. Gibson, but that it really belonged to the Buttons, and that they received not less than \$25 an acre profit on the sale; that the title was taken in the name of Gibson to deceive and defraud purchasers; that plaintiff stated to the Buttons that he relied upon their judgment and experience and knowledge in selecting the land, and not upon his personal knowledge or opinion or examination, and that it was represented to him by them that he could rely upon their knowledge and on their fairness, honesty and advice in purchasing the land. The answer contains objections to jurisdiction, a general denial, and a plea of ratification, and estoppel. The court found for plaintiff, and defendants appeal.

In August, 1908, the maker of one of the notes transferred deposited the money to pay it in a bank at Kenesaw to await the delivery of the note. Dr. Latta, having become dissatisfied, directed the bank to retain the money and not to pay it over to the land company. On September 28, 1908, about 10 or 12 days before the filing of the petition in this case, Byron G. Button went to Kenesaw to see about this collection. Plaintiff told him that he paid too much for the land, that it was not as represented, and that defendants had agreed to give him water, but had failed to do so. Button then delivered to him two shares of stock in the Farmers Union Ditch Company, and plaintiff authorized the bank to pay the money on the note. At that time Dr. Latta also asked Button to sell the land for him, and listed it for sale with the land company as his agent at the price of \$40 an acre. A number of the notes which had been transferred to the defendants were sent to the Exchange Bank of Kenesaw for collection. October 10, 1908, this action was begun

to rescind the contract, to enjoin the bank from transferring, returning or in any manner disposing of the notes in its hands, and to quiet the title to the Kenesaw real estate in the plaintiff.

1. The jurisdiction of the district court for Adams county is assailed on the ground that the Kenesaw bank is not a necessary party to the suit. As to this point, we think it clear that that court had jurisdiction. The action was not only for the rescission of the contract, but to impound the negotiable securities which were in the hands of the Kenesaw bank for collection, and to prevent them reaching the hands of innocent purchasers, and to quiet the title to the Kenesaw real estate. These objects were properly embraced within the scope of the action and were necessary in order to give complete and adequate relief. The bank was a proper and necessary party, and the summons was properly served in Lancaster county against the other defendants. The cases cited by the defendants are not applicable under these conditions.

2. Defendants next complain that the evidence is insufficient to sustain the decree. It is impossible within the limits of this opinion to set forth the testimony in the record, much of which is irrelevant. We are not inclined to place much stress upon the claim that there was a fiduciary relation existing between the parties by reason of the conversation had between Dr. Latta and A. L. Button on the train. Nor do we place much weight upon the contention that the plaintiff, or the other members of the party, was prevented by undue means from making independent investigations as to the quality and value of the lands. This must be qualified, however, by saying that the short time which the party spent in the valley and the manner in which they were kept upon the move might of itself suggest to a prudent and cautious person that perhaps there was some ulterior object in making such a hurried trip. There are other facts which in our opinion justify the conclusion of the district court. It appears that farming operations upon the lands in the

neighborhood of Mosca had been for the most part abandoned after having been carried on successfully for about 10 years. The reason for this being that water from irrigated lands at a higher level percolated through the soil and raised the level of the water table in that vicinity from a depth of 15 feet to a depth of only 4 or 5 feet. In its passage through the soil the water became saturated with alkaline matter, and by capillary attraction the water holding this matter in solution was drawn to the surface of the ground and there evaporated, leaving a white alkaline substance on the surface. It is shown that this condition may perhaps be remedied by tile drainage, but that this is really largely a matter of experiment, and would cost about \$7 an acre. When the party reached the valley, they were first shown beautiful fields and farms near Monte Vista, where the subsoil was of a sandy or gravelly nature. It was represented to them that this land was worth from \$100 to \$250 an acre. The land in this vicinity is somewhat stony, but plaintiff was told that the land which he would be shown next day was of a better quality, and not so rough and stony. As a matter of fact, the Monte Vista land was being held at from \$40 to \$75 an acre at this time. After the party left the hotel the next morning, and on the way to the Mosca land, plaintiff noticed that the farms had been abandoned, and, upon inquiry, was told that the right to water for irrigation had been in litigation between the United States and Texas or Mexico, that the litigation had lasted for 10 or 12 years, and had just terminated favorably for the settlers, and that, on account of the uncertainty of procuring water and the trouble of getting it, the settlers had moved away. The evidence shows that, while there had been some litigation, it was not as represented, but was of the nature of the settlement of priorities; that the right of the Farmers Union Ditch Company to the water was not seriously in dispute, and that the litigation had never operated to prevent farming operations in this vicinity. The difference

in the testimony of the Buttons and that of the Lattas with respect to the conversation in these respects is very slight. On the one hand, the plaintiff's witnesses say that the representations were made direct to them as matters of fact in order to induce them to purchase, while the defendants' witnesses testify that the party was repeatedly informed that the Buttons were new in the valley and knew nothing about irrigation, that they had heard that the lands were of the values stated, and that they had been informed that the reason the people had left the locality was on account of litigation and uncertainty about their water rights. It may be that the defendants' story is the true one. The district court, with the witnesses before it, found otherwise. In any event, it seems clear that, even if the statements made by Button and Hammond were qualified by them as being only what they had been told by others, they effectually conveyed the impression to the purchaser by one means or another that these statements were matters of fact. There is no dispute but that conversation of the general tenor testified to by the plaintiff's witnesses took place. Even if we disregard many of the other matters, the false value placed upon the irrigated lands near Monte Vista, which was evidently done to enhance in the purchasers' mind the value of the land they were to see next day; the plausible reason advanced for the abandonment of the farms near Mosca, which though having a substratum of truth was practically false; the false statements as to the value of adjoining lands; and the fact that the Buttons were not, as represented, selling the lands of others upon commission, but were in reality selling their own land, furnished sufficient basis for the decree, under principles long established in this court.

If representations are made of material facts, and to ascertain their truth or falsity would necessitate an investigation, the party to whom they are made may place reliance on them. *Foley v. Holtry*, 43 Neb. 133; *Olcott v. Bolton*, 50 Neb. 779; *Hamilton Brown Shoe Co. v.*

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Milliken, 62 Neb. 116; *Perry v. Rogers*, 62 Neb. 898; *Dwinell v. Watkins*, 86 Neb. 740; *Brucker v. Kairn*, 89 Neb. 274. On the whole record, we are satisfied that plaintiff was deceived and misled as to the real nature and value of the property, that if the true facts had been disclosed he would never have purchased this land, and that the representations made were false and fraudulent in a matter exceedingly material to the transaction.

3. The defense of ratification we think is not supported by the evidence. Dr. Latta testifies that at the time he listed the land for sale with the defendants, while he was dissatisfied, he was not informed fully as to all the material facts. In the short interval between this time and the beginning of the suit he learned the truth, and at once began this action. Defendants were placed in no worse position by the delay.

In our opinion, the evidence sustains the findings and decree of the district court, and it is, therefore,

AFFIRMED.

STATE, EX REL. GRANT G. MARTIN, ATTORNEY GENERAL,
RELATOR, V. JOHN J. RYAN ET AL., RESPONDENTS.

FILED JUNE 22, 1912. No. 17,363.

Municipal Corporations: OFFICERS: ACT EXTENDING TERM: CONSTITUTIONALITY. The legislation of 1911, amending the charter of South Omaha by providing that the general city election shall be held on the first Tuesday in May, 1913, and that elective city officers shall retain their offices until that time, is not unconstitutional as a legislative appointment of the present incumbents for another year or as being an enactment for the sole purpose of extending their term of office.

ORIGINAL application in *quo warranto* to oust respondents from the office of fire and police commissioner of the city of South Omaha. Objection to jurisdiction. *Objection overruled.*

Grant G. Martin, Attorney General, and George W. Ayres, for relator.

H. B. Fleharty and Smyth, Smith & Schall, contra.

ROSE, J.

Respondents are fire and police commissioners of South Omaha, and this is an action in the nature of *quo warranto*, brought originally in this court, to remove them from office under the statutory provision that such officers may be removed for wilful failure to enforce any law which it is made their duty to enforce. Comp. St. 1911, ch. 71, sec. 1a.

Jurisdiction to oust them is now challenged on the ground that the term of office to which the charges of dereliction of duty apply has expired. They insist that the information refers alone to failure to enforce the law during the term which expired April 2, 1912; that under the charges made the statutory power of removal did not extend beyond that date; that the remedy was limited to removal for the remainder of that term; that they cannot be removed, since the term has expired; that they have been elected for another term which they are now serving; that, there being no authority to remove them during the present term, the action should be dismissed.

Is the assertion that respondents are serving a new term well founded? On the first Tuesday in April, 1910, they were elected for the term of two years. In 1911 the legislature amended the charter of South Omaha by providing that the general city election shall be held on the first Tuesday in May, 1913, and that the elective city officers shall retain their offices until that time. Comp. St. 1911, ch. 13, art. II, secs. 13-16; laws 1911, ch. 12. Respondents assert that the amendment was unconstitutional, and that they were elected in 1912 under the charter as it existed prior to the amendment postponing the

city election until 1913. If the amendment is valid, however, there was no legal city election in 1912, and they are still holding office under their election in 1910, and in that event their term has not yet expired.

To sustain the contention that the statute extending the term of office another year is void, respondents rely on *State v. Plasters*, 74 Neb. 652. The rule of law announced in that case was stated in this form: "The legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers." A casual examination of the amendment of 1911 will show that in passing it the legislature made no attempt whatever to appoint city officers, and that the sole purpose of the act was not to extend their official term. The extending of the term was merely incidental to a long enactment containing important legislation relating to municipal affairs over which the lawmakers had unquestioned legislative power. The authority of the legislature to lengthen the term, where the office is not created by the constitution, is recognized in the case cited, wherein it is said: "The office is not mentioned in the constitution. It is a creature of the statute, and there can, of course, be no doubt that the power that created the office may abolish it, or may change it, including the lengthening of the term of the office itself." It is a mistake to assume that the legislature, by changing the date for holding the election and by providing that the present incumbents shall hold their offices until they can be filled a year later under the new law, appointed respondents. Respondents hold their commissions from the people by whom they were elected. Strictly speaking, they were not elected for two years only, but for two years and until their successors are elected and qualified. When respondents were elected in 1910, their term of office, as fixed by the city charter, was subject to the following provisions of the general election laws: "Every officer elected or appointed for a fixed term shall hold office until his successor is elected, or appointed and qualified, unless the statute under which

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he is elected or appointed expressly declares the contrary." Comp. St. 1911, ch. 26, sec. 104. The charter of South Omaha and the general election law in force in 1910 having made respondents' term of office, not two years, but two years and until their successors are elected and qualified, they were not appointed by the legislature to serve a year in addition to their regular term, but are now serving part of the term for which they were elected in 1910. It seems clear that the rule announced in *State v. Plasters*, 74 Neb. 652, does not control the question here presented, and that the attack made on the validity of the amendment of 1911 is unfounded. The objection to jurisdiction is therefore

OVERRULED.

OREY C. BELL ET AL., APPELLEES, v. CHRISTIANA DINGWELL ET AL., APPELLANTS.

FILED JUNE 22, 1912. No. 17,082.

1. Courts: COUNTY COURTS: JURISDICTION. Controversies involving title to and ownership of real estate are not within the jurisdiction of county courts.
2. Equity: JURISDICTION. "It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." *Buchanan v. Griggs*, 20 Neb. 165.
3. ———: TITLE TO LAND: ACCOUNTING. One out of possession of real estate, the title to his undivided portion of which has been fraudulently obtained by the one in possession, may join with his suit in equity for a recovery of his title a demand for an accounting as to the rents and profits and for a partition of the land.
4. Limitation of Actions: FRAUD. The pleadings and evidence examined and set out in the opinion. *Held*, That this case is controlled by the limitations of section 12 of the code.
5. Guardian and Ward: AUTHORITY OF GUARDIAN: BORROWED MONEY:

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LIEN. A guardian is without authority to borrow money upon his ward's real estate without an order from a court of competent jurisdiction. If he does so, it will be held to be his personal debt, and, if he be an owner of an undivided interest in such real estate, the debt will be treated, as between him and his ward, as a lien upon his undivided interest only.

6. **Mortgages: LIEN.** The mortgage set out in the opinion *held* properly charged to the undivided interest of the defendant Christiana Dingwell in the land in controversy.

7. **Evidence: LAWS OF OTHER STATES: ADMISSIBILITY.** Where the trial court admits exhibits purporting to be the laws of another state, the question as to whether or not a sufficient foundation had been laid for their admission will not be inquired into where it appears that the opposite party has himself alleged the facts to be the same as shown by such exhibits.

8. **Parent and Child: SUPPORT OF CHILD: ACCOUNTING: REVIEW.** Where minor children are taken into the family of their mother and step-father, and they all thereafter reside together as one family during the minority of such children, each rendering to the other such support, care, education, obedience, and service as is usual with families of their class, without any agreement as to compensation from either to the other, and during such time the family is residing upon 80 acres of land belonging to the mother and children jointly, a judgment, refusing compensation to the parents for support, care and education of the children, and denying to the latter a recovery for rents and profits of the property, during such period of time, will be sustained on appeal.

9. **Homestead: RIGHTS OF INFANTS.** Where a widow, whose husband died intestate while a resident of a foreign state, removes from such state to this state, remarries here, is then appointed guardian of the minor children of herself and such decedent, and applies to the court of the foreign state for leave to exchange land situate therein, which under the laws of that state belongs to such widow and minor children jointly, for land in this state, and, upon obtaining leave so to do, fraudulently, and in violation of the terms of the order of the court, takes title to such land in her own name, to the exclusion of such children, and then moves upon the land, so acquired, with her second husband, she does not thereby obtain the right to hold the same as a homestead as against such children.

APPEAL from the district court for Pawnee county:
JOHN B. RAPER, JUDGE. *Affirmed as modified.*

John O. Dort, for appellants.

William M. Jackson and Story & Story, contra.

FAWCETT, J.

Defendant Christiana Dingwell is the mother of plaintiffs; defendant John Dingwell being her second husband. Her former husband, and father of the plaintiffs, Robert Bell, a resident of the state of Iowa, died December 5, 1885, leaving defendant Christiana and the plaintiffs as his only heirs at law. At the time of his death he owned 80 acres of land in Taylor county, Iowa, and some property in the town of Clearfield, in that county. The children were then aged three, six, and eight, respectively. In 1887 defendant Christiana was married to her codefendant. In December, 1889, she was appointed by the county court of Pawnee county as guardian of the plaintiffs, and duly qualified as such. On February 15, 1890, she was duly appointed foreign guardian of plaintiffs by the district court for Taylor county, Iowa. Previous to her marriage with her codefendant, she had moved with the plaintiffs to Pawnee county, in this state. Upon her appointment as guardian by the district court in Iowa, she filed in that court her petition, in which she alleged that she was the owner of an undivided one-third, and the minor children, plaintiffs herein, were the owners of an undivided two-ninths, each, in the real estate in that county; that the farm land was worth \$2,200, subject to a mortgage for \$700, \$500 of which was then due and unpaid; that neither she nor the minor children had any means with which to pay the mortgage; that the property in Clearfield was worth \$600; that petitioner was permanently located in Pawnee county, Nebraska, was the mother of said minors, and that they resided with her; that Jacob Wade was the owner of the northeast quarter of the northeast quarter of section 35, and the northwest quarter of the

northwest quarter of section 36, township 2, range 10, in Pawnee county, Nebraska, which was worth about \$2,000; that Wade wanted to move to Taylor county, Iowa, and wanted to exchange his 80 acres in Pawnee county for the 80 acres belonging to the minors and herself in Taylor county, and would pay \$200 difference in value, the mortgage upon the Taylor county land to be paid off; "that such a trade would be of great benefit to the minors and herself, as they could live upon it and save expenses of agent," etc.; and prayed for an order of the court permitting her to sell the town property in Clearfield and to apply the proceeds on the mortgage upon the farm; that she be permitted to convey to Wade the shares of the minors, together with her own share, and to receive from him the \$200 to apply on the mortgage on the Taylor county land, and also receive from him a warranty deed conveying the Pawnee county land to herself and said minors jointly, naming the respective shares of each. Upon a hearing of this petition after due and legal notice had been given to all parties interested, the court entered a decree as prayed in the petition, in which it was expressly provided that the petitioner should take from Wade a warranty deed conveying to her and said minor heirs jointly, naming the respective shares of each, the Pawnee county land. In accordance with this decree of the Taylor county court, defendant Christiana, for herself and as guardian for the minors, executed to Wade a deed to the Taylor county land, but instead of taking a deed of the Pawnee county land to herself and the plaintiffs jointly, as directed by the Iowa court, she took the same in her own name individually. She received the \$200 "boot money" from Wade, and sold the Clearfield, Iowa, property for \$400. The mortgage upon the Iowa land, when paid, amounted, as found by the court, to \$800, which, as will be seen, was \$200 more than the aggregate of the money received by her from Wade and the sale of the Clearfield property. For this excess of \$200, together with interest, the district court upon the hearing of this case gave her credit.

the parties, to be a first lien upon the share of defendant Christiana; that the land be partitioned according to the respective rights of the parties, or, if the same cannot be equitably divided, that it be sold and the proceeds divided according to the rights of the parties, and that plaintiffs have judgment against the defendants for the sum of \$2,266 with interest, as their share of the rents and profits, and the same be adjudged a lien upon the interest of Christiana in said lands; and for general equitable relief.

Defendants filed objections to the jurisdiction of the court on the ground that defendant Christiana is guardian of the plaintiffs; that she has made no final report as such; that she has not been discharged, and that the guardianship matters are still unsettled; and also filed a general demurrer to the petition. The objections and demurrer were all overruled, and defendants answered, first, that the court had no jurisdiction for the reasons set out in their objections above outlined; second, the statute of limitations. The answer then admits the filing of the petition in the court in Taylor county, Iowa, and the entry of the decree by that court; admits the relationship of the parties to this suit; admits receiving the use and benefit of the Pawnee county land, but denies the value thereof "being anything like the sum alleged by plaintiffs;" admits that the land was deeded to defendant Christiana in her own name; denies generally all allegations not specifically admitted; alleges that while the guardian's action was pending in the Iowa court the mortgagee commenced a foreclosure of the mortgage; the borrowing by defendant Christiana from her husband and codefendant of sundry sums of money, which sums, together with the \$400 received from the sale of the Clearfield property, were used in paying debts of her former husband; that there was no money or property remaining in the estate of her former husband, after paying off the debts and the judgment in foreclosure; that defendant Christiana is the owner of the land in contro

during their minority; that the said care, etc., was furnished at a cost to defendants of more than \$9,000; denies owing plaintiffs any sum whatever; and alleges that upon a strict accounting plaintiffs are and would be indebted to the defendants in the sum of \$9,000, no part of which has been paid. The prayer is that they be allowed to go hence, recover their costs, and "for such further and different relief as may be just and equitable." The reply denies all allegations in the answer, except that defendant Christiana has never made an accounting as guardian of any of the plaintiffs, has never filed any report as such guardian, and that no proceedings have ever been had in the county court since her appointment.

The court upon a hearing found generally for plaintiffs, and found specially: the death of Robert Bell; the property owned by him at the time of his death and the relationship of the parties as above outlined; that, under the laws of Iowa in force at the time of the death of Robert Bell, his lands descended in fee simple, one-third to defendant Christiana and two-thirds to the three children jointly; finds the ages of the plaintiffs; that the youngest reached his majority February 16, 1906; that this action was begun February 13, 1909; the marriage of the defendants; the appointment of defendant Christiana as guardian in the two courts above referred to; that Christiana made application to make the exchange of lands and obtained an order therefor and executed such exchange, as above set out; the sale of the Clearfield property by defendant; that the mortgage on the Taylor county land amounted, with interest and costs, to \$800; the receipt by defendant Christiana from the

sale of the Clearfield property of \$400 and from Wade \$200; that after receiving the deed to the Pawnee county land defendants moved upon the same, and had lived thereon ever since, occupying it as a family homestead; that plaintiffs, as part of the family, lived with defendants for many years; that during the time plaintiffs lived at defendants' home they were supported, educated and cared for by defendants as parents, and during said time plaintiffs worked for and were governed by defendants as their own children, without any agreement concerning payment of any living expenses for plaintiffs; that since taking possession of the land defendants have made valuable improvements, the present worth of which is \$1,750; that the annual rental value of the land, exclusive of the improvements, from 1903 to 1910, was \$180 per annum; that plaintiffs were each entitled to recover \$40 per annum for said years, with interest at 7 per cent. from December 1 of each year, as the value of such use and occupation of the land, from the time plaintiffs ceased to be supported by defendants; "that, after deducting the sum of \$200 and interest from these amounts, there is due and owing to each of plaintiffs from defendants \$239.39" (the \$200 here referred to is the sum which defendant Christiana was required to furnish to complete the payment of the mortgage upon the Taylor county land); "that neither of plaintiffs knew until within four years before the commencement of this action that said deed named Christiana Dingwell as sole grantee, instead of setting out the rights of all plaintiffs, nor did either of plaintiffs discover until within four years before beginning this action that they had any interests in the land;" that defendants executed the mortgage and renewed the same upon the dates and for the amount above set out; that the same is now a lien upon the premises, but as between plaintiffs and defendants should be a lien only upon the share of Christiana; that Christiana has never had an accounting as guardian, nor made and filed any report of her doings as

does not require serious consideration. The county court would have been entirely without jurisdiction to determine the main question litigated in this suit, which is the title to and interest in real estate.

It is further urged that the court erred in awarding partition, for the reason, as claimed, that this is an action concerning real estate, where the title is in dispute; that the pleadings show this to be true, and that the first fact to be determined is that of ownership, which is a fact to be determined by a jury, and under the law cannot be tried out in an action in equity for the quieting of title and the partitioning of land among cotenants; that partition cannot be had by one out of possession, where they have no title, or where the title is in and ownership claimed by another. In support of this contention they rely upon *Seymour v. Ricketts*, 21 Neb. 240, and *McMurtry v. Keifner*, 36 Neb. 522. In those cases the parties asking for partition claimed to have the legal title; and, the parties asking for partition being out of possession, we held that they could not obtain such relief until they had first obtained possession by the ordinary proceedings at law. In this case plaintiffs expressly alleged that they did not have such a title, but that defendants fraudulently, as we shall later show, possessed the entire legal title. They therefore were not in a condition to bring ejectment nor to obtain any rights in any sort of an action at law. They were compelled in the first instance to appeal to a court of equity to invest them with their actual ownership in and title to their undivided interests in the lands in controversy. The court having properly acquired jurisdiction for that purpose, which was really the main and controlling question, properly retained it for all purposes. As was said by our present chief justice, in *Buchanan v. Griggs*, 20 Neb. 165: "It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters

sary litigation. In order to do so, the court properly considered and disposed of the question of title and ownership, the value, use and occupation of the premises, the liability of the respective parties for the payment of the mortgage, the value of the improvements, and, after disposing of all of those questions, proceeded to award partition of the land in controversy.

Another defense relied upon is the statute of limitations. Under the holdings of this court in *Kerr v. McCreary*, 84 Neb. 315, and *Bank of Alma v. Hamilton*, 85 Neb. 441, it is questionable whether the defendants are entitled to urge this defense, for the reason that, by appearing and asking for an accounting and praying for equitable relief, they have subjected themselves to the equitable powers of the court and have bound themselves to do equity on their part. In the first paragraph of the syllabus in the latter case we held: "If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary, and the statute of limitations is no bar to the imposition of such conditions." In addition to the rule there announced, we think the district court was right in holding, in effect, that this suit is governed by section 12 of the code, which provides that an action for relief on the ground of fraud may be brought within four years after the discovery of the fraud. But it is urged by defendants that "the petition in this action does not plead or attempt to plead any fraud, but that by mistake or inadvertence appellant Christiana Dingwell was named

as sole grantee to concur. It deed, through a tiana Dingwell plaintiffs should of an undivided in the pleading mother in taking it should have construed in con alleged in the Christiana and land; that the Iowa court; the defendant to take the names of the and as found by the land in Iowa violation of the Pawnee county legal fraud, and tion said that take or inadvert becomes all the ther fact that s not take the til that she is the court was right.

It is further that the \$900 m defendants, be and in support were compelled to raise the balance of the debt which included This contention tical effect of th

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third interest of the defendant or the other \$200 as here money that it was necessary to make the payment of the any other debts or liabilities incurred by her either the Iowa court county. As guardian she

was entirely without authority to borrow money upon her wards' property and pay debts chargeable against their father's estate in Iowa, without a proper order from the proper court. In addition to this, the evidence as to the expenditures made by defendant is so vague, uncertain and indefinite as to be incapable of ascertainment. Defendant having placed this mortgage upon the land without authority, it must be held to be her individual loan, and the court properly charged it against her interest.

It is next insisted that the court erred in admitting certain exhibits offered by plaintiffs "purporting to be the laws of the state of Iowa." We find it unnecessary to inquire into this question, for the reason that, even if the exhibits were improperly admitted, they simply corroborate the allegations contained in defendants' petition, which she filed in the Iowa court, and in which she set out the interests of herself and her children, as the heirs of Robert Bell, deceased.

It is next contended that the court erred in declining to make any allowance to defendants for having "nursed, fed, clothed and schooled these appellees while they were minors." We are not willing to disturb the finding of the court upon this point. The district court, while refusing to permit defendants to recover for the items named, also refused to permit plaintiffs to recover anything for the rents and profits of the property during the same period of time. This disposition of that point is clearly equitable and meets with our approval.

The statement is made by defendants in their brief that the land in controversy is the homestead of defend-

ant Christiana, of which she cannot be dispossessed except by her voluntary act. The brief contains 29 specific assignments of error, none of which in any manner refers to the defense of homestead. The brief contains no argument in support of such controversy, but counsel contents himself with the mere assertion above noted. This proposition, stated concretely, is: Can a widow, whose husband died intestate while a resident of another state, remove from such state to this state, remarry here, apply to the court of the foreign state for leave to exchange land situate therein, which under the laws of that state belongs to said widow and the minor children of such decedent, for land in this state, and, upon obtaining leave so to do, fraudulently, and in violation of the terms of the order of the court, take title to such land in her own name to the exclusion of such children, then move upon the land, so acquired, with her second husband, and hold the same as a homestead, as against such children? The district court declined to so hold. We likewise decline.

Finally, it is contended that the findings and judgment of the court are not sustained by the evidence. Upon this point defendants must likewise fail. We have examined the record from beginning to end, and, were the case before us in the first instance, we could not reach a conclusion more favorable to defendants than that reached by the district court.

In one respect the decree must be modified. The court in its decree finds: "That defendants since taking possession of the land have erected valuable and permanent improvements, the present worth being \$1,750, for which they are entitled to compensation." After confirming the shares of the respective parties the decree provides that the land be "divided among the parties according to their shares, provided that there be added to the share of Christiana Dingwell an amount in area equal in value to \$1,750, value of improvements." This judgment is not in accordance with the finding. The improvements were placed upon the land as a whole. One-third of these im-

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It appears by the will that the intestate died in February, 1901; and that he left to J. F. Bradshaw the right of filing and allowing and discharging of claims against that the bank was to pay the amount of the notes referred to and nor any of its obligations of the intestate had been agreed to notify in person, and that the things were under the control of the assets of the estate and were all intact; and that the actual notice of

ministrator, and that a few days prior to the application for administration that said J. F. Bradshaw promised and agreed with C. E. Adams, the president of the petitioner, that he would keep him advised and let him know when any administration of said estate would be undertaken or commenced. The district court found: "That said administration of the estate of H. N. Bradshaw was prematurely closed, and that the order limiting the time for filing claims was void, for the reason it was issued one day before the issuance of the letters of administration, and that no six months' notice of said time limit was given or published as required by law." The district court also found that all of the equities were in favor of the petitioner, the First National Bank of Superior, and all the issues of fact were in favor of said bank, but found "as a matter of law that the petitioner is barred from any relief herein by virtue of section 226 of the decedent act, being section 5091 of chapter 13 of Cobbey's Annotated Statutes of Nebraska for 1907."

The section reads: "Every person having a claim or demand against the estate of a deceased person whether due or to grow due, whether absolute or contingent, who shall not after the giving of notice as required in section 214 of this chapter, exhibit his said claim or demand to the judge or commissioners within the time limited by the court for that purpose shall be forever barred from recovering on such claim or demand or setting off the same in any action whatever; provided, that if any person having such claim or demand shall fail for two years from and after the death of such decedent to apply for or take out letters of administration on the estate of such deceased person or cause such letters to be taken out as provided for in this chapter, then such claim or demand shall likewise be forever barred; this section shall not be construed to limit or affect the time within which a person may enforce any lien against property, real or personal, of such deceased person, nor shall it be construed to affect actions pending against the deceased at the time of his death."

county, and by publishing the same at least four weeks successively in some legal newspaper printed in this state, or in any other manner which the court may direct."

Section 217 provides: "The probate court shall allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not, in the first instance, exceed eighteen months, nor be less than six months, and the time allowed shall be stated in the commission."

The district court finds: "That said administration of the estate of H. N. Bradshaw was prematurely closed, and that the order limiting the time for filing claims was void, for the reason that it was issued one day before the issuance of the letters of administration." The district court also finds: "That no six months' notice of said time limit was given or published as required by law." The court also finds "all of the equities are in favor of the petitioner." It also finds "all the issues of fact in favor of said petitioner." The bar which it finds in section 226 should not be applied to this case. The section contains no bar against the consideration of the bank's claim if administration is taken out by the heirs. The bank was only barred by the section in question from making application and obtaining letters of administration. When the heirs have made application for letters of administration and they have been granted, there is no reason why the bank's claim should not be presented and allowed as are the claims of other creditors. The finding of the district court touching the equities of the case and the merit of the bank's claim is fully sustained by the record, and this finding would seem to be enough to justify the reversal of the case.

It should be remembered that the delay in administration of this case was for the benefit of the heirs of the estate. It seems to have been carried out in the utmost good faith for six and one-half years. There was a part performance of the agreement, because dividends on the

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There was a trial in the district court before a jury, and each side moved for a directed verdict. The court overruled the defendant's motion for a verdict and sustained the plaintiff's motion, and thereupon the jury rendered a verdict for the plaintiff in the sum of \$664.42. There was a motion for a new trial, which was overruled, and judgment was rendered on the verdict.

The evidence shows that the defendant went to see the plaintiff, and told him that he had sold out his stock, and he wanted to change the lease. The defendant had sold his stock to a Mr. Haddox, who took possession of the store, and he wanted the plaintiff to take Haddox for pay, but the plaintiff testified that he refused to do so. It seems that a man named Adams was running the business when Haddox was not around. There was some correspondence. The plaintiff testified that he received from Coufal from January 1, 1906, to October \$360, then he received a year's rent from one John Voborial, \$250. He also received \$40 from a firm named Mestl & Prucha for storing some machines. He also received \$60 from Frank Chuca, who was referee of some bankruptcy stock; \$28 from Frank Hefner, and from one J. B. Sewdak he got \$60. He also received \$50 from a firm named Bierbaum & Schinden. It is in testimony that Prucha knew that Coufal had traded his stock of goods to some one in the month of July, 1906, and that the parties who got the stock of goods were in possession of the building. It is claimed by the defendant that a Mr. Adams, who was in charge of the stock of goods, paid the rent after July, 1906, while he remained in the building. After Adams ceased to manage the stock of goods which was being run by him, the plaintiff received certain goods to be applied on the rent at the agreed price of \$10. The plaintiff himself testified that he had agreed to take the goods which Mr. Adams left in that building in payment for the rent of the building for eight or ten days. The improvements made were slight and for the preservation of the property, and to enable the occupation of the

premises by the persons who paid rent for which the defendant was given credit. There was a stipulation between the parties, part of which was read: "It is hereby stipulated and agreed between the plaintiff and defendant that plaintiff rented a portion of the premises in question in this case to one Frank Hefner some time after defendant removed therefrom at an agreed price of \$4 per month, and that said Frank Hefner paid on said rent the sum of \$28 prior to the commencement of this suit, and that said rental was made without the knowledge or consent of defendant." The testimony taken and stipulation show that there was a lease of the premises, and that the plaintiff never released defendant from the conditions of the lease, although he was requested to do so and hold the purchaser of the stock of goods liable for the remainder due on the lease. As there was no question of fact to submit to the jury, the motion of the plaintiff to instruct the jury to find a verdict in his favor and against the defendant in the sum of \$664.42, with interest at the rate of 7 per cent. from February 15, 1909, was properly sustained.

In addition to what has been said, the rule adopted in *Howell v. Bowman*, 89 Neb. 389, would seem to dispose of the case. In that case it was held that the findings of the trial court in a law action would not be set aside simply because such findings did not comport with the conclusion which this court as triers of fact might have reached; in order to justify a reversal of the findings of the court below, in a law action, on a question of fact, such findings must be shown to be clearly wrong; and where each party to a trial requests the court to direct a verdict in his favor, he waives the right to thereafter insist that any question of fact should have been submitted to the jury.

In the instant case the plaintiff moved the court to instruct the jury to find a verdict in his favor and against the defendant, and the defendant moved the court to instruct the jury to return a verdict for the defendant in

Morley Twine & Machinery Company." It was alleged that Homer L. McKelvie was liable because he affixed the signature of his wife to the note, and that Mrs. H. L. McKelvie was "liable upon said note as maker, she having given due authority to the said Homer L. McKelvie to execute said note." The fact appears from the petition that Mrs. McKelvie is a married woman, because it is alleged that she is the wife of H. L. McKelvie. As her disability to contract as a single woman appears from the petition, one of the pertinent questions presented is whether the petition should have alleged facts to take the case within the exception which would have made her liable as a married woman. Of course, as the fact appears from the petition which takes away from her the power to contract as a single woman and prevents her from making a binding promise, it need not be set up by way of answer.

In her answer, Mrs. McKelvie admitted that her husband made the note as her agent, and that she is therefore the maker of the note; but she further alleges that on the date when the note was executed she was, and ever since that time has been, a married woman, and that said note and contract and indebtedness forming the basis of action was not entered into or contracted upon the faith or credit or with the intention to bind her separate estate, trade, business or employment, and said contract and obligation would not and does not in any manner concern the separate estate, property, trade, business, labor or service of this defendant. Also that on the 8th day of May, 1908, or at any time since that date, she did not have any separate estate, property, business, or trade, nor was she performing any labor or service on her sole account.

By the reply the plaintiff admitted that the defendant was a married woman during all the times complained of.

It appears by the pleadings that the defendant was a married woman at the time the note sued on was exe-

pressed in apt and appropriate language. It would have expressly enacted that she could bind herself and her property by her general engagements whether made or entered into for the benefit, or on account of, her separate property or not, instead of empowering her to contract alone with reference to her own property, trade and business." Judge NORVAL, delivering the opinion of this court, pertinently suggests that "in construing this statute it is important to bear in mind that the legislature was not attempting to impose disabilities upon married women, but was engaged in removing some of those already existing. *She can contract only so far as her disabilities have been so removed by the legislature.* The statute requires that contracts, to be valid, must be entered into with reference to her separate property, and it is for the courts to so construe this enactment as to carry out the legislative will." There is in the case quoted an extended review of the decisions of this court touching the question involved, beginning with *Davis v. First Nat. Bank*, 5 Neb. 242, and ending with *McKinney v. Hopwood*, 46 Neb. 871.

Section 2 of the act (Comp. St. 1911, ch. 53) reads: "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man in relation to his real and personal property."

Section 3 reads: "A woman may, while married, sue and be sued, in the same manner as if she were unmarried."

Section 4 reads: "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name."

By reference to section 1 of the act it will be seen that

Union State Bank v. McKelvie.

of binding her separate estate or property, and that said notes or either of them did not concern her separate property, trade or business. This court held in that case that the burden was on the plaintiff bank to establish that the wife signed the notes intending thereby to pledge her separate estate. The bank failed to enter into evidence upon this question. It was held that the wife was not liable in that case.

The burden was upon the plaintiff to allege a liability upon the part of the defendant, Mrs. McKelvie. Having alleged that she was the wife of the defendant, H. L. McKelvie, and therefore, in effect, that she was a married woman and would for that reason be generally disqualified to contract, it became necessary further to allege a fact under the statute, the existence of which would enable her to contract about the particular matter. Such fact was neither alleged nor proved nor admitted by the stipulation. There was therefore a failure to make a case.

The judgment of the district court in favor of the defendant, Mrs. H. L. McKelvie, is right, and it is

AFFIRMED.

LETTON and SEDGWICK, JJ., concur in the conclusion.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1912.

JOHN FORREST, APPELLANT, V. NEBRASKA HARDWARE COMPANY ET AL., APPELLEES; C. S. SALISBURY ET AL., APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 16,730.

- 1. Corporations: TRANSFER OF ASSETS TO STOCKHOLDERS: VALIDITY.**
Transactions between stockholders and members of the board of directors of a corporation, by which the property of the corporation is transferred to one of such stockholders and directors, when attacked by another stockholder, will be examined by the courts with care, and when a want of good faith, fraud or inadequacy of consideration is shown, such sale will not be upheld. But where the proposition of purchase is made to the board and accepted, and also submitted to a meeting of the stockholders and accepted by a majority of them, and the transaction appears fair and free from fraud and upon a reasonable consideration, a court of equity will not declare such sale invalid.
- 2. ———: MISAPPLICATION OF FUNDS: APPOINTMENT OF RECEIVER.**
Where, in a proper action, it is shown that the managers and head officers of a corporation have unlawfully withdrawn the funds of such corporation and applied them to their own use, a receiver will be appointed to take charge of the affairs of the corporation, unless the funds so withdrawn are restored and the corporation and stockholders are indemnified against further illegal acts by such officers.
- 3. ———: DISCRIMINATION AGAINST STOCKHOLDER: INJUNCTION.** It is the duty of the managing officers of a corporation to consult, protect and conserve the interests of all stockholders alike and without discrimination. Discrimination against a stockholder by which the value of his stock is unjustly depressed will justify the interposition of a court of equity and the unlawful acts of such managers will be enjoined.

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prices, and take a lease for term of years on the south storeroom at 100 per month, including the basement running from a point on east side of elevator, toward front, including all areaway under front walk, and middle room in south basement. I will further agree to exchange, from my stock to your at all times as far as possible to do in fairness to each other and on an equitable basis, further that business may not be disturbed to great an extent, will suggest that we invoice the mdse. as it now stands, but changing such items as may hereafter be found to more properly belong to either wholesale or retail stock to such stock. Respt. yours, Leon Baker." A meeting of the board was held on that day, and it is recorded that "a proposition as per attached (memo) was made by Mr. Leon Baker to purchase the retail department. A motion was made by Allen Crosby, and seconded by A. H. Holcomb, to accept the proposition. The motion was carried by all the votes." Signed by the secretary, to which is annexed the corporate seal of the Nebraska Hardware Company. This record does not show whether a full quorum of the board was present or not. There is a paper attached to the record, but not identified as an exhibit, showing that on April 27, 1909, "a special meeting of the stockholders of the Nebraska Hdw. Co. was held, at their office, to consider the sale of the retail department to the Baker Hdw. Co." We are unable to find any reference to notice given the stockholders of this meeting. A list of stockholders present is given, showing the amount of stock held or represented by each. The total number of shares represented appears to be 546, constituting \$54,600 par value of the stock. The capitalization of the corporation is \$87,000, leaving \$32,400 of the par value, or 324 shares, unrepresented. Plaintiff was represented by his attorney, as proxy, and voted his 90 shares against the sale. Defendant Salisbury voted for it. This gave a vote of 456 shares, or 20 more than a majority of all the stock, in favor of the sale, and 90 shares against it. The 160 shares held by Baker prior to that time were not represented nor

the transactions, to reverse the decree of the district court and invalidate the sales. We fully recognize the rule stated in *Miller v. Brown*, 1 Neb. (Unof.) 754, and *McLeod v. Lincoln Medical College*, 69 Neb. 555, but it is doubted if those cases can be applied here. We think the decree of the district court, in so far as it is to be applied to the transactions with Baker and the Baker Hardware Company, should be affirmed. It is from this part of the decree that plaintiff and cross-petitioners appeal.

The court found, as the evidence clearly shows, that defendant Jakway was insolvent and was indebted to the Nebraska Hardware Company for funds withdrawn therefrom. He was the vice-president of the company, and, owing to the decease of the president, was and had been its active manager. But the finding does not disclose the exact extent of his indebtedness. It is also found that defendant Crosby was indebted to the company, but there is no finding as to the amount nor as to his insolvency; that plaintiff and cross-petitioners are entitled to an injunction against those two, restraining them from increasing their indebtedness; that plaintiff and the cross-petitioners are entitled to a bond with good and sufficient surety indemnifying them against the unlawful acts theretofore done or that may thereafter be done by the defendants Jakway, Crosby and John Therkelson, the latter having been at a later date entrusted to some extent with the management of the business affairs of the Nebraska Hardware Company; that plaintiff and cross-petitioners were entitled to have a receiver for the company appointed, unless the defendant Jakway and Crosby repay into the funds of the company the amounts owing by them, and the bond given within 40 days from the rendition of the decree; that, upon failure so to do, a receiver would be appointed upon motion of plaintiff and cross-petitioners, with power to close up the business of the company. A general injunction was allowed as against William E. Jakway, Allen Crosby, George D. Leach, John Therkelson, J. H. Bracken and A. H. Holcomb, enjoining

them perpetually from becoming further indebted to the Nebraska Hardware Company or in any manner appropriating its funds to their individual use. This decree was rendered December 24, 1909. We have no information as to a compliance with the order of the court for the repayment of the funds unlawfully withdrawn, nor as to the management of the affairs of the business of the company since that time.

We have been impressed by a perusal of this record that the business of the company has been recklessly handled by those in charge, and cannot avoid the conclusion that the district court was fully justified in seeking to promote the honest administration of its affairs. We are also persuaded that much of the mismanagement has been, to some extent at least, for the purpose of depressing the value of plaintiff's investment in the stock of the company, causing him to either surrender it or sell it at a sacrifice. He, at one time, was active in the management of the business of the company. He removed to another state, his son being left in the employment of the company. Later the son joined his father. Subsequently to that time another employee was suspected of purloining the goods and money of the company. It is said that the alleged guilty party made a confession in writing in which he implicated plaintiff's son, but the written statement is not to be found in this record. On August 19, 1908, a telegram was sent to plaintiff requiring his immediate presence in Lincoln. This was followed the same day by a letter explaining that the son was charged with a participation in the embezzlement. The father left his home at once, and before the receipt of the letter which fell into the hands of the son. The son thereupon telegraphed his father at Lincoln that he was coming, and did so. Soon after his arrival in Lincoln he was arrested without a warrant and placed in jail, notwithstanding his voluntary return and assertion of innocence. He was held in the jail for a short time, but long enough for the proposition to be made to the father that the matter could be settled with-

out publicity by a surrender of his stock. This he did not agree to, and the son was released. It is claimed that the officers of the company did not direct the arrest, and upon that plea they were exonerated by a direction of the court to the jury in a civil action tried in the federal court, while the verdict went against the irresponsible officer who made the illegal arrest. If people could know their rights and resist such outrages in proper cases, such actions might not be so frequent.

On the 30th day of January, 1909, a meeting of the board of directors was held, when a motion was made by W. E. Jakway and adopted by the board "to allow the following emplies (employees) as salary and additional salary" the sums stated in the resolution, "to be paid to them during the year 1909." The list comprised every stockholder, except plaintiff, whose name was omitted. The amount thus voted totaled \$4,572, and of which Jakway and his wife were to receive \$1,536, Baker \$960, Crosby \$576, and others in smaller amounts; each allowance being equal to 6 per cent. upon the stock held. Many of the persons voted this bounty were not employees of the company. It is true that it is said that this resolution was subsequently rescinded and none of the money was paid, yet the fact of such action is at least suggestive of a dishonest purpose and discrimination in its inception. At another time, the company being indebted to Jakway, he applied to the person in charge of the records and books for the issuance of a certificate of stock, dating it back one year in order that he might receive a dividend thereon, but which was refused and not issued. These and other facts which might be mentioned clearly justified the district court in requiring unquestioned indemnity against further acts of the kind sought to be guarded against. Indeed, it is doubtful if the interests of plaintiff will be thus effectually protected.

From the length of time intervening since the trial, with no record before us of any subsequent move made by plaintiff, we are led to believe that the money wrong-

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Red Willow County v. Peterson.

and share alike and should either of my said daughters die without issue then it is my desire that the portion that would have gone to her shall go to the surviving sisters, or their heirs." By the language used, it seems clear that it was the intention of the testator that the fee title should vest in the three living children, only upon the condition that they should outlive their mother, and, in case of their not doing so, the title should go to their children by force of the will; that whatever interest the daughter would have should terminate at her death, if that event occurred before the death of the widow, and upon such death the interest she would have had should go to her children. If this is the proper construction, not only the interest of Rose Kline but that of her mortgagee was terminated by her decease.

The decree of the district court is

AFFIRMED.

RED WILLOW COUNTY, APPELLEE, v. HANS I. PETERSON ET
AL., APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 16,772.

Sheriffs: MILEAGE FEES: CONSTRUCTION OF STATUTE. By the provisions of section 5, ch. 28, Comp. St. 1911, a sheriff is not required to report and pay over to the county treasurer mileage fees; they being expressly excepted in the section.

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Reversed and dismissed.*

W. S. Morlan and C. E. Eldred, for appellants.

*Charles D. Ritchie, Perry, Lambe & Butler and Ritchie
& Wolff, contra.*

REESE, C. J.

This is an action by plaintiff, the county of Red Willow, against defendant, Hans I. Peterson, a former sheriff of

In re Estate of Sanford.

was signed by the governor. This is all the light given upon the subject, in so far as this language is concerned. It is argued with considerable force and skill that other provisions of the law requiring all fees to be paid into the county treasury, as well as the fact that the salary of the sheriff is fixed by statute, do not indicate that the mileage fees are to be excluded. The intention of the legislature, in the absence of ambiguous terms, is to be drawn from the language used. It is very clear that it was the purpose to exclude mileage from the report, or it would not have been excepted. The record shows that the exception was incorporated by the deliberate act of the law-making power. It is a well-established rule of construction that all words used in a statute should be given some meaning, if it can be done. The words "except mileage" are not meaningless, and but one intention can be attributed to their use, and that is, that mileage fees are not to be reported. If not, they are not to be accounted for.

It follows that the judgment of the district court must be reversed, and the cause dismissed, which is done.

REVERSED AND DISMISSED.

ROSE, J., took no part in the decision.

IN RE ESTATE OF WHITFIELD SANFORD.
CHARLES W. SANFORD ET AL., EXECUTORS, APPELLANTS, V.
SAUNDERS COUNTY, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 16,458.

1. Taxation: INHERITANCE TAX: DOWER INTEREST. The dower interest of the widow in the estate of her deceased husband, whether taken under his will or by operation of law, is not subject to an inheritance tax.
2. Opinion Modified. Former opinion in this case, 90 Neb. 410. modified.

In re Estate of Sanford.

and it appears that, after the succession of the estate, the beneficiaries under the will, who were also the sole executors thereof, agreed between themselves upon the so-called satisfaction of this claim. Such an agreement should not have the effect of avoiding the payment of a substantial part of the inheritance tax.

Finally, as to the matter of interest, we are of opinion that interest should be charged on the amount of the tax found after deducting the dower interest of the widow from the appraised value of the estate, and the payment already made upon the inheritance tax, and interest should be computed on the balance from the date of the death of the decedent.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

REESE, C. J., not sitting.

FAWCETT, J., dissents from so much of the foregoing opinion as refers to the claim of Charles W. Sanford, for the reasons assigned in his dissenting opinion upon the former hearing, reported in 90 Neb. 410, 417.

HAMER, J., concurs in the dissent of FAWCETT, J.

LETTON, J., dissenting.

I am unable to concur in the view that, where a widow renounces her dower right and takes under a will, the devise or bequest is not liable to the inheritance tax. It is my view that, if the widow had taken her dower right, it would not be liable to the tax, since dower is not transferred by will, and is not the subject of inheritance. It, therefore, does not come within the provisions of the statute. But, in this case, as was held in the former opinion, since the widow rejected the dower and took the provisions made for her in the will, the bequest or devise is taxable.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

James E. Kelby, Halleck F. Rose and Byron Clark, for appellants.

A. G. Wolfenbarger and George W. Berge, contra.

BARNES, J.

Action for damages alleged to have been sustained by plaintiffs, by reason of the construction of that part of defendants' railroad near the city of Lincoln, known as the "Denton cut-off," which, it is alleged, caused the waters of Middle creek to flow over, across and upon the plaintiffs' land, destroying the crops growing thereon, and permanently injuring the land itself.

It was alleged in the plaintiffs' petition that the defendants in constructing their line of railroad established and made dikes and dams, and negligently, carelessly and recklessly filled and dammed up the natural watercourse and channel of Middle creek, entirely changing the natural bed and channel of that stream, causing its waters to be turned aside from the bed channel and natural course in which they had run from time immemorial, and carelessly, recklessly and unnecessarily cut and caused to be constructed a new and entirely different outlet and channel to carry the waters of the stream, beginning with the point of diversion at about one-half a mile above and northwest of the land owned and farmed by plaintiffs, thereby causing their land to be subject to overflow. It was further alleged in the petition that "before the building, establishing and construction of the grades, embankments, trackage, dikes and dams, and the diversion of the waters of said stream, the said land of the plaintiffs was worth, at a fair and reasonable valuation, the sum of \$200 per acre; but on account of said negligent, careless, reckless and unnecessary acts and doings of the said defend-

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LETTON, J., concurring in part, and dissenting in part.

I agree with the conclusion that the plaintiffs are not entitled to recover for the alleged permanent injury to the land in question, upon the ground that they are not the owners of the fee and were not at the time of the overflow, and that for that reason the judgment should be reversed, at least, in part. Doubtless for prudential reasons, the cause was submitted to the jury in two separate parts; one, to find the extent of the injury to the land, and the other, to find the amount of damages suffered by the injury to and destruction of the growing crops. The jury found that the damage to the land amounted to \$1,200, and to the growing crops, \$1,839. The land was used for market gardening, and the various crops growing thereon were of great value, and that growing on the greater part was wholly destroyed. If the embankment constructed by defendants was negligently made and was the cause of the overflow, there can be no doubt of plaintiffs' right to recover to the extent of the injury to the growing crops, and the fact that the jury made a finding as to the extent of that damage, separate from the injury to the land, would permit the judgment to be affirmed for \$1,839. This being true, the questions as to the proper construction of the embankment and as to the cause of the increased overflow became largely questions of fact to be solved by the trial jury. It is conceded that the valley of Middle creek was subject to occasional overflows, and at such times the water spread out over the valley to a greater or less depth, but at no time to the depth attained on the occasion named, and with such injurious effects as in the instance referred to in this record. There is evidence that the water was forced upon plaintiffs' possessions to such an extent as not only to destroy the growing gardens, but to remove the soil in places and deposit it in others, thereby destroying all and rendering the ground in no condition for replanting or resetting.

There is also evidence that the construction of the em-

by the defendant for that purpose. It also appears that the horse, after being used for a little time, formed a habit of stopping short of the full length of the rope, and it was necessary to whip him in order to correct that fault; that the boy was given a stick for that purpose, and on the occasion of his injury it is supposed that he struck the horse, in order to make him pull up to the full length of the rope and thus drop the hay squarely upon the stack; that, in so doing, the accelerated speed or plunge of the horse caused one of the tugs to break or come apart where it had been spliced, with the result that the end of the whiffletree, which was thus released, flew back and struck the plaintiff in the face, causing the injuries of which he complained.

In view of this state of facts, which seem to be established beyond dispute, we are of opinion that this case should be ruled by *Ittner Brick Co. v. Killian*, 67 Neb. 589. That was a case where the plaintiff, a bright, intelligent boy, 14 years of age, was injured while oiling a pressed-brick machine, at the command of the master. It appeared in that case, as in the case at bar, that the plaintiff had been instructed how to perform his duties, and had been warned of the danger in performing them; and yet, notwithstanding that fact, he was allowed to recover. There, the trial court instructed the jury that, "under the law, when one is known to be inexperienced, who is put to work upon a machine which is dangerous to operate unless with care and by one who is familiar with its structure, it is the duty of the employer to instruct such person so that he will fully understand and appreciate the danger of his employment and the necessity for the exercise of due care therein. Therefore, if you find from the evidence that the employment of plaintiff at the time of his injury was dangerous, and that plaintiff was known to be inexperienced, and that defendant knew the peril or should have known the peril to which plaintiff would be exposed, and did not give him sufficient instruction therein, and if he from youth or inexperience failed to appreciate the

danger, and was injured in consequence thereof, and because of defendant's negligence, and the plaintiff was not guilty of contributory negligence, then the defendant is responsible." That instruction was approved, and it was held that, youth and inexperience being inherent, and not the result of carelessness or negligence, it was not error to state in an instruction for personal injuries that if plaintiff, "because of his youth and inexperience, failed to appreciate the danger," and, because of want of proper instruction, fails properly to appreciate the risks involved in certain labor which he is commanded by the master to perform, and is injured, the master will be liable.

It should be observed that, while the plaintiff in this case was instructed how to drive the team, and was told how to avoid the danger and escape injury, still it appears that the father of the boy instructed him to lead the team, and, when the team was exchanged for the single horse, to lead the horse. It appears, however, that after a time it was found that plaintiff could not induce the horse to go far enough to properly dump the hay on the stack by leading him, and then, in order to perform the work, the child was compelled to walk behind the horse and whip him when he arrived at that point. This the defendant had directed the plaintiff to do, and when he was injured he was doing the very act which he had been commanded to perform. Notwithstanding the fact that the plaintiff had been told that there was danger, it cannot be presumed that a child only nine years old was possessed of sufficient judgment and forethought to fully appreciate such danger. Without doubt, when plaintiff saw it was necessary to whip the horse, he stepped up behind him to perform that act without sufficient comprehension of the result in case of accident. The defendant must have been aware of that fact, and he should not have employed a child of the tender years of the plaintiff to perform so dangerous a service. We are therefore of opinion that this contention should not be sustained.

Defendant's next contention is that the uncontroverted

in fact, the plaintiff purchased the same as a second-hand machine, and said machine at the time plaintiff signed said application and when this defendant issued said policy was more than seven years old, and the same was purchased by the plaintiff as a second-hand machine, and when it was already old and worn-out; that as a matter of fact said machine was not of the value or condition represented by the plaintiff, but as a threshing machine was old and worthless." The application contains the following questions and answers: "When did you purchase the above described property? June, 1906. Was it new when purchased by you? Yes." The agent who wrote the application did not testify. Plaintiff denies making the answers as written, and testifies that he was only asked by the agent how long he had run the machine. Moreover, there is no proof in the record that plaintiff had any knowledge that the company would not insure machines used more than a certain number of years, so the materiality of this question and answer as a representation is perhaps questionable.

It is a question of fact for the jury, and in this case, since a jury was waived, it was for the trial court, to determine whether false representations were made in order to induce the insurance company to enter into the insurance contract. We have held that the burden is on an insurance company both as to pleading and as to proof to establish that written answers made to questions in an application for insurance were made as written. *Ætna Ins. Co. v. Simmons*, 49 Neb. 811; *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842. See, also, *Fidelity Mutual Fire Ins. Co. v. Lowe*, 4 Neb. (Unof.) 159, and cases cited. This issue was determined against the defendant by the trial court, and the evidence supports the finding. Under the failure of proof on the part of defendant on this point, the question as to whether the amendment to the reply was properly made is of no moment.

The third assignment of error is that the court erred in excluding evidence material to defendant's case. The

The contentions made by the plaintiff in this court are, in substance, that the findings and decree are not sustained by the evidence, and that the court erred in admitting testimony as to declaration of ownership of the land by Drake during his lifetime. Of course, if the evidence in behalf of plaintiff failed to establish his right to the relief sought, it is unnecessary to consider the question as to the admission of evidence.

In brief, plaintiff asserts that his father, James N. Drake, appropriated money left by plaintiff's mother, Emma N. Drake, at her death in 1899, to the amount of over \$500; that the father soon after bought a stock of groceries in Omaha with this money for the plaintiff; that the business and stock belonged to plaintiff; that the stock and business was afterwards exchanged for the Cherry county land, and the title wrongfully taken by James N. Drake in his own name, in place of that of plaintiff, who is the true owner. He invokes the equitable principle that he is entitled to follow the trust fund and accept it in its changed condition, if he so elects.

James N. Drake is dead. The action is against his heirs and administrator *de bonis non*. The evidence shows that James N. Drake in August, 1899, purchased from one Edwards a stock of groceries in Omaha. He carried on the business in the name of the plaintiff Rodney E. Drake, who was then a boy of about 12 or 13 years of age, for about 7 months, when he disposed of the stock and business to one Joice for \$650 in money and 160 acres of Cherry county land. James N. Drake died in February, 1909, leaving surviving him Emma N. Drake, his widow. Drake had been married twice previously. By his first wife he had two children, Rodney E. Drake and Charles Louis Drake. The whereabouts of the latter does not seem to be known, or whether he is yet living.

The testimony as to the fact of Mrs. Drake's possession of money consists of direct testimony by the plaintiff to that effect and testimony as to declarations by James N. Drake. Plaintiff testifies that a few years before his

Drake v. McDonald.

mother's death she showed him over \$500 in money; that this money was kept in the drawer of a commode and in an ordinary pillow. He afterwards said the money was left in the house at the time of his mother's death; but gave as his reason for saying so that it had been shown to him by her, but he could not say that it was a year or a month before. He also said he did not see it after her death. As to the declarations of James N. Drake, the testimony of Edwards, who sold the stock of goods to the father, is that at the time of the sale Drake told him that he was using his boy's money and buying the stock for him. A young woman, now Mrs. Shultz, who assisted in the store and who was then about 19 years of age, testifies that she heard Mr. Drake tell Edwards it was Rodney's mother's money that he was putting in the business. Houliston, the broker who negotiated the subsequent sale from Drake to Joice, testified that the bill of sale was drawn with "R. E. Drake," and "R. E. Drake, by James N. Drake, guardian," as vendors, at Mr. Drake's direction, and that he was told the boy owned the store and the land would be the boy's. On cross-examination, however, Houliston testifies that Drake "claimed that the property was his, but it was in the boy's name; he was doing business in his boy's name." "Q. Did he give you any reason at that time as to why the property was in his boy's name? A. He said he was in a hard row of stumps; he had some judgments against him; he said he could not pay them just now; he said he was going to pay them; he said I understood that business." Mrs. Shultz testifies that when Mr. Drake was in York, a few weeks before he purchased the stock of groceries, he showed her \$900 in money, and told her that this money, except \$150, "was Susan's money."

On the other hand, it is shown that after the father's death Rodney E. Drake caused to be prepared and presented to the county court a petition asking for administration of his father's estate. At the same time he filed a petition asking that the estate of his mother, Susan R.

Drake, who had died about 10 years before, be closed up. He was appointed administrator of his mother's estate, and in the inventory filed by him as such administrator he listed certain pieces of real estate, but showed no personal property as belonging to her at the time of her death. At that time apparently he had no recollection that his mother had any personal property at the time of her death, because neither in the petition for his appointment nor in his inventory of the estate does he recite this fact. He was also appointed administrator of his father's estate, but he filed no claim against that estate for the money which he now insists he inherited and which he claims his father misappropriated. Furthermore, the mother left insurance in the sum of \$500, half of which was payable to her husband, James N. Drake, and half to her son, Rodney E. Drake. The father was appointed guardian of Rodney, took possession of the money, and reported his disposition of it to the county court, the allowance of which report seems to be still pending, so far as the record here shows. No claim was made in these proceedings that the guardian ever acquired any other money of the plaintiff.

Upon considering the whole case, we are of opinion that the most reasonable explanation of the facts is that given Houlston by Drake, that Drake was in debt, that the stock was his, but that he was conducting the business in his son's name. It is shown that Drake had conducted another store in his wife's name some years previously, which he had disposed of, and that in the interim he had carried on no steady business, but had been assessor, and had been engaged in selling mining stock. There is nothing to show from what source Mrs. Drake could or did acquire any money of her own.

In order to establish a resulting trust by parol proof, the evidence must be clear and convincing. Of course, a preponderance is sufficient, but in order to preponderate it must be of such a character that when all the circumstances are taken into consideration, and considering the

ANDERSON V. HENSON, 50 N.W. 314. THE RECORD SHOWS THAT a number of the persons whose names appear upon the petition signed their names thereto after it was filed, but there is absolutely no proof that the requisite number of names were not upon the petition before it was filed or before the first publication of the notice of the applicant.

Since there is nothing to show that the requisite number of names of qualified signers did not appear upon the petition before the filing thereof or before the publication of the notice, the district court did not err, and its judgment is, therefore,

AFFIRMED.

J. F. STRATTON V. STATE OF NEBRASKA.

FILED SEPTEMBER 28, 1912. No. 17,568.

Peddlers: LICENSE. A Missouri corporation, which manufactured and produced ranges in that state, employed defendant to sell them from a wagon in this state. He worked for a salary and had no interest in the sale or in the horses and wagon which he used in the business. A statute imposes a tax upon peddlers, but expressly excepts "parties selling their own works or production . . . either by themselves or employees." *Held*, That defendant is within the exception and is not liable to be taxed as a peddler under such statute.

possession of his faculties and in the exercise of ordinary care, there was nothing to divert his attention from his own peril. The darkness of the night and his knowledge of his surroundings would naturally stimulate his sense of danger. There is no evidence to sustain a finding that the injury was wantonly or wilfully inflicted. Cases requiring notice or warning to persons who are permitted to use a path across tracks and analogous cases do not apply to the present situation. Proof that there was no light on the car, that there was no brakeman thereon, and that it was moved without notice or warning, in connection with other facts disclosed, is not sufficient, under the circumstances of this case, to show actionable negligence. *Chicago, R. I. & P. R. Co. v. McIntire*, 29 Okla. 797, 119 Pac. 1008, and cases cited.

The judgment, therefore, is not sustained by sufficient evidence, and is for that reason reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., concurring in part.

I believe the case should be reversed and a new trial had for reasons unnecessary to set forth, since a majority of the court concur in the opinion; but I think there was sufficient proof to carry the questions of fact to a jury.

FAWCETT, J., concurring.

I concur in the judgment of reversal, on the ground that the amount of the verdict is so grossly excessive as to force the conclusion that it is the result of prejudice on the

Carlton v. City Savings Bank.

JOHN CARLTON, APPELLEE, v. CITY SAVINGS BANK,
APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,766.

Principal and Agent: PERSONAL INJURIES: LIABILITY. Where the receiver of an insolvent trust company continues, under an order of the court, to collect for a bank the rents of a lot mortgaged to it, the same as the trust company had previously done, and there is a controversy between the receiver and the bank as to the insolvent's interest in such rents and in the lot itself, the receiver being subject to the directions of the court, and not, as agent, under the control of the bank, the latter is not, as a matter of law, necessarily liable to the tenant from whom the rents are collected for damages resulting from the negligence of the receiver's employee in repairing the mortgaged lot.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Reversed.*

William Baird & Sons, for appellant.

H. H. Bowes and E. C. Hodder, contra.

ROSE, J.

The petition alleges that the wife of plaintiff was personally injured through the negligence of defendant, and this is an action to recover damages for the loss of her services. From a judgment in favor of plaintiff for \$1,606. defendant has appealed.

In a separate action the wife of plaintiff previously recovered in her own right a judgment for the same injuries and her recovery was sustained by this court. *Carlton v. City Savings Bank*, 85 Neb. 659.

As tenants, plaintiff and his wife made their home on a leased lot in Omaha. The latter, in attempting to use a board walk extending from the rear of the house to an outhouse on the premises, fell through the walk into an old cistern September 24, 1903, and was injured. She was not at fault. Prior to the accident the walk had been tem-

established by the evidence that the filling of the cistern must be regarded as the act of the bank."

To justify the giving of this instruction, plaintiff argues the following propositions: The trust company, at the time of the appointment of the receiver, had no interest of any kind in the leased premises. It had no right of possession of any kind. The receiver of an insolvent corporation takes only the assets thereof. The receiver succeeded the trust company as agent, and defendant recognized the agency. In collecting rents and in making repairs he acted alone for defendant and was exclusively its agent. Defendant was responsible for his acts. With knowledge of the receiver's actions defendant accepted the benefit of his collections and ratified his acts as agent, not as receiver. Is this argument sound? Did the trial court correctly instruct that Potter, receiver of the insolvent trust company, was the agent of defendant in filling the cistern, and that his employee's tort, which resulted in injury to plaintiff's wife, was the act of defendant? When the receiver was appointed, it was part of the business of the insolvent trust company to collect for defendant the rents of the lot where the injury occurred. While acting as receiver Potter directed the filling of the cistern and out of funds in his hands paid for the work negligently performed. His records as receiver so show. The decree appointing Potter receiver of the trust company and directing him in regard to its business ordered him to "conduct said business in all its branches." It was under this order that the receiver assumed to continue the collection of rents for defendant. A receiver may, under the directions of the court, proceed to carry on the business and perform the agreements of the insolvent corporation, if deemed to be for the best interests of those who may establish rights in the litigation. To prevent the receiver from collecting the rents, as the trust company had done, required an order of court. The fees for making the collections inured to the benefit of those interested in the assets of the trust company. The business of collecting

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& C. S. Co., 68 Neb. 233, 239. The record showing, as already indicated, that the receiver collected the rents and distributed them as receiver under the order of the court, that there was a controversy between defendant and the receiver in regard to the interest of the trust company in the rents and in the mortgaged lot, and that defendant was unable to control the receiver as its own agent, the trial court carried the doctrine of agency too far in holding that defendant, as a matter of law, is liable to plaintiff for the wrongful act of Potter's employee in filling the cistern and in replacing the walk in a negligent manner. The instruction is erroneous under the following doctrine announced in the former case: "A receiver appointed by the court in the progress of litigation acts as receiver for all of the parties interested; but he is not the agent for the parties in the sense that each of the parties interested in the litigation is personally severally responsible for his wrongful or negligent acts." *City Savings Bank v. Carlton*, 87 Neb. 266.

Ratification of the acts of Potter so as to make defendant liable for the tort of his employees is not shown. For the misstatement of law in the instruction quoted, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., concurring.

I suppose that, in determining whether the savings bank is responsible for the action of the receiver in filling the cistern, we must ascertain whether the receiver was acting as the agent of the bank in so doing. The receiver was not employed by the bank. He had no connection with the business in any way, except by virtue of his appointment as receiver by the court. A receiver is an officer of the court and is at all times, in everything he does, subject to the order of the court, and is not subject to the control or influence of private parties. The bank, then, did not authorize him to do anything, and could not in any respect control or influence his actions. Such facts are incon-

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Savings Bank, 82 Neb. 582. The Omaha Loan & Trust Company rented the property as agent for the bank; this was a part of its regular business. The receiver, when appointed, also acted as agent for the bank in the collection of the rents. The agency might have been terminated by the City Savings Bank at any time. After the receiver had collected the rents a dispute arose as to their application, he claiming some rights under a second mortgage held by the Omaha Loan & Trust Company which had come into his hands as receiver. This dispute was settled by an order of the court in favor of the bank, as shown by the order set forth in the opinion. The controversy, however, until it was ended, did not interfere with the collection of the rent or the care of the property or the liability of the mortgagee in possession to the tenant. The cistern was filled in November, 1902, when Potter, as receiver, was acting as agent for the bank. The bank received all the rents, less the agent's commission for renting, by the payment of taxes according to its written agreement with Handy, the owner.

The fact that it was the receiver, and not the corporation, that was its agent is immaterial, and so, also, is the fact that it had a dispute with its agent as to the application of the proceeds. The bank was in possession and control and it is chargeable with its agent's negligence.

FAWCETT, J., concurs in this dissent.

GEORGE L. SMITH, APPELLANT, v. ALFRED PALMER ET AL.,
APPELLEES.

FILED SEPTEMBER 28, 1912. No. 17,081.

Partition: ALLOWANCE OF ATTORNEY'S FEE. In partition, an allegation in the petition that the land can properly be divided among the owners without a sale and a denial thereof in the answer raise no issue of fact, since the matter in dispute relates to procedure

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regulated by statute and does not make the proceedings adversary within the meaning of the rule that the trial court may allow plaintiff's attorney a reasonable fee to be paid out of the common fund, where the proceedings are amicable.

APPEAL from the district court for Butler county:
BENJAMIN F. GOOD, JUDGE. *Reversed with directions.*

L. S. Hastings, for appellant.

A. J. Evans, contra.

ROSE, J.

This is an action for partition of a lot in Ulysses. The property was regularly sold by a referee to plaintiff for \$2,045. In confirming the sale and in ordering distribution of the proceeds, the trial court, in the final judgment, directed the referee to pay the costs out of the fund in his hands, including a fee of \$75 for plaintiff's attorney. Defendants did not ask for a new trial nor appeal from the judgment. Ten days after it had been rendered, however, they made a motion to retax the costs and modify the judgment by charging the attorney's fee of \$75 to plaintiff. This motion was sustained and execution was awarded for the collection of the retaxed fee. Plaintiff has appealed, and the only question presented is the correctness of the order retaxing costs.

The motion to retax was based on the ground that the proceedings were adversary, and that consequently no fee for plaintiff's attorney could be allowed. *Oliver v. Lansing*, 57 Neb. 352. Plaintiff relies on the doctrine that partition is a remedy inuring to the benefit of all parties having an interest in the land, and that the trial court may allow plaintiff's attorney a reasonable fee to be paid out of the common fund, where the proceedings are amicable. *Johnson v. Emerick*, 74 Neb. 303.

The interest of each owner, as stated in the petition, was not disputed in the answer. No objection to the action for partition was made by any defendant. The in-

regulated by a statute requiring the appointment of a referee to make partition. If the property cannot be divided "without great prejudice to the owners," it is the referee's statutory duty to so report to the trial court. Code, secs. 812-814. Whether partition is practicable must, in the first instance, be determined by the referee. *Burke v. Cunningham*, 42 Neb. 645. The statutory procedure was followed and the referee reported that the land should be sold. There were no exceptions to the report of the referee, nor was there any further hearing. There was, therefore, no controverted issue to make the proceedings adversary in such a sense as to prevent the allowance of the fee in question.

The judgment is therefore reversed, with instructions to the district court to overrule the motion to retax costs.

REVERSED.

REALTY INVESTMENT COMPANY, APPELLANT, v. WILLIAM A. SHAFER, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 17,091.

- 1. Vendor and Purchaser: SALE OF LAND: RESCISSION: REPRESENTATIONS.** A purchaser of land, to justify a rescission on account of a misrepresentation, must show in some manner that it was material and misled him to his injury and damage.

2. ———: ———: ———: **ERRONEOUS STATEMENT OF VALUE.** As a general rule a mere erroneous statement of value, when made by the owner of land in an effort to sell it, is not actionable.
3. ———: ———: **ACTION FOR PRICE: DEFENSE OF FALSE REPRESENTATIONS.** Where defendant, in a suit on a note executed by him and delivered to plaintiff in part payment of the purchase price of land, pleads that he was induced to make the purchase by means of false representations of plaintiff in regard to the character of the land, he must, in establishing that defense, prove, among other things, facts or circumstances showing that he was entitled to rely on such representations.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Hall & Bishop and G. W. Lewis, for appellant.

George A. Adams and Morning & Ledwith, contra.

ROSE, J.

This is an action on a promissory note for \$840. Defendant agreed to buy from plaintiff a quarter-section of land in South Dakota for \$5,200, and paid \$200 down. Later he executed a formal contract of purchase and a series of notes for the remainder of the purchase price. The note in controversy is the first of the series. It bears date August 21, 1909, and fell due December 1, 1909. In his answer defendant admitted the execution of the note, but pleaded it was void on the ground that he had been induced to sign it by the false and fraudulent representations of A. H. Rait, who, as agent of plaintiff, conducted the negotiations leading up to the alleged fraudulent sale. The answer also contained a cross-bill demanding judgment for the amount of the cash payment. The charges of fraud consisted principally in the making of false representations that the land was situated 2½ miles from Wetonka; that land of like character was selling for \$35 to \$40 an acre, and that the tract in controversy was better than the average quarter; that it was free from alkali, gumbo or hard-pan; that there were stones upon the

accompanied by two real estate agents, Hutchinson and Allen. The party spent two days inspecting lands near Wessington Springs, but defendant declined to make a purchase because the lands offered for sale were too rough and hilly to suit him. Afterward he went with his two friends and Allen to Aberdeen, and by the latter was introduced to Rait, who was an entire stranger. To Rait defendant stated he would buy a piece of land, if he found one to suit him, and he was taken in an automobile on a tour of inspection. On the trip Rait occupied the front seat with the chauffeur. Defendant sat in the rear seat with his two friends. Three tracts of land were inspected. In regard to the first, defendant testified Rait guaranteed that it was free from alkali, but that he did not buy it because he thought there were too many buffalo-wallows, that they represented alkali, and that the land did not suit him. He looked at the second piece, but, according to his own testimony, did not buy it because there were too many stones on it. Up to this time the evidence is undisputed that he acted on his own judgment as to the character of the land, taking into consideration buffalo-wallows as indicating the presence of alkali. The third tract is the land in controversy. When they arrived, Rait remained at the automobile and defendant went onto the land with one of his friends. There was a swale on the quarter-section, and the rough land in connection with it was variously estimated by the witnesses to be from three to eighteen acres. Defendant admits that he crossed this swale, and he afterward referred to buffalo-wallows therein. He therefore saw the swale itself and the land on both sides

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charge.

The evidence being insufficient to sustain the verdict, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HOSEA CARPENTER, APPELLANT, V. MATTHEW SCHNERLE ET
AL., APPELLEES.

FILED SEPTEMBER 28, 1912. No. 16,620.

1. **Highways: ESTABLISHMENT BY PRESCRIPTION.** Slight deviations from the line of public travel to avoid mud, pools, or natural obstructions will not necessarily prevent the establishment of a highway by prescription, especially so when it appears that the natural obstructions have been removed and that the roadway has been used without interruption or substantial change for more than ten years.
2. ———: **DEDICATION.** Where a landowner notifies the public to cease travelling a road across his lands, and in lieu thereof to travel over the section-line road along the edge of his land, and he and his grantees, subsequently, for a period of ten years, permit the public without interruption to travel along said section line over a strip of land less than two rods in width, such acts will be construed to constitute a dedication of such strip of land as a public road.
3. ———: ———: **ACCEPTANCE.** In order to constitute a highway by dedication, it is not necessary that the offer of dedication be accepted by the public authorities. It may be accepted by the public itself, and the acceptance by the public itself is shown by its entering upon the land and enjoying the privilege offered by user.

which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterrupted, without substantial change, for a period of time necessary to bar an action to recover the land." *Bleck v. Keller*, 73 Neb. 826; *Engle v. Hunt*, 50 Neb. 358. Whether a highway three-fourths of a mile long at the place described was acquired by either dedication or adverse user is the controlling question in the case. The claim of the public was shown by a witness who testified without objection that, about 12 years before the trial, the county surveyor surveyed the road; that it was laid out by the county; that damages were allowed, but never paid; that he lived on land west of the road and was notified to move his fence back; that the witness, under written notice from a supervisor, had done work on the road; that he "worked some there most every year;" that his son had also worked on the road, and that a man by the name of Davis "plowed the hills down about 12 years ago." While the county board's orders in regard to this road appear to have been introduced in evidence, they are not in the bill of exceptions. Evidently the parties consider them immaterial in determining the issues tried. A number of witnesses testified that the road, without substantial change, had been open to, and used by, the public generally, continuously, for 12 years or more before defendants attempted to close it; that the travel had never been interrupted; and that continuous use had worn tracks in the sod. It was shown that the roadway left open by those who cultivated the lands in controversy varied in width, but there is positive testimony that a space sufficient for the passage of wagons, buggies and stock was always used for that purpose. It appears that, for a time, heavy loads were, for a short distance, diverted at one place by a hill, but that there was continuous travel close to the section line during the entire length of the strip of land in question for more than 10 years. It is shown without contradiction that one Blackburn, who from 1896 to 1900

Carpenter v. Schnerle.

owned the quarter section of land, along which the north half mile of the road runs, notified the public, who were traveling over a road that ran through the middle of his quarter from north to south, to cease traveling over that road and to use the section line road; clearly showing a recognition and dedication of the north half mile of the road in controversy, on his part. It is also shown without contradiction that one Davis, who owned the south eighty, now owned by defendant Matthew Schnerle, as early as 1897, worked the hill on the road contended for, in front of his eighty, so as to make the hill more passable for vehicles of all kinds traveling along the road; thus showing a recognition and dedication by him of the other quarter of a mile of the road in controversy. The evidence is uncontradicted that, not only prior to the foregoing acts by Blackburn and Davis, but at all times subsequent thereto, until the defendants went into possession of the lands in 1907, the road had been open to the public and traveled by the people passing along there, at will. A dedication of land for a public road along a section line will be inferred upon much weaker testimony than would be required to establish such a dedication of a road running through a tract of land. In this case we think the evidence is ample to establish both a dedication, and user for the statutory period, of the road in controversy.

The judgment of the district court is therefore reversed and the cause remanded, with directions to that court to grant a perpetual injunction against both defendants as prayed in plaintiff's petition.

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., dissenting.

It is said in the opinion that the controversy involves a road running three-fourths of a mile south from the north side of the section, and that the trial court ordered it opened for one-half mile along the section line, and the result of the judgment of the trial court was to keep open

There is no attempt made in the opinion to show any right to cross this southwest quarter of section 27, but I understand from the record that there is no substantial claim by either party that there has ever been a road across the southwest forty of section 27, either by general user or by grant, and that there is no way that the proposed road three-fourths of a mile long can be made available. I do not think that the law will allow the creation of such a *cul-de-sac*, as it is named in the opinion, by prescription, and therefore the conclusion reached is not warranted by the record.

**BETTYE P. BOOTH, APPELLEE, v. FREDERICK M. ANDRUS,
APPELLANT.**

FILED SEPTEMBER 28, 1912. No. 16,630.

1. **Physicians and Surgeons: MALPRACTICE.** In an action for malpractice, a physician or surgeon is entitled to have his treatment of a patient tested by the rules and general course of practice of the school of medicine to which he belongs.
2. ———: **SKILL REQUIRED.** Physicians and surgeons are not required to possess the highest knowledge or experience, but the test is the degree of skill and diligence which other physicians in the same general neighborhood and in the same general line of practice ordinarily have and practice.
3. ———: ———. Physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty.

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4. ———: MALPRACTICE: TRIAL: EXAMINATION OF THE PERSON. Where during the trial of an action against a surgeon for damages for malpractice, the plaintiff voluntarily submits a portion of her body to the inspection of the court and jury, it is error for the court to refuse to permit an examination, by a limited number of reputable surgeons of defendant's selection and school, of that portion of the body so exhibited.
5. ———: ———: ———: ———. And where, in such an action, the claim is single, and is based upon two separate operations on the same day, upon two different portions of plaintiff's body, if plaintiff voluntarily submits to the inspection of the court and jury that portion of her body upon which one of such operations was performed, it is error for the court to refuse to permit an examination, by a limited number of reputable surgeons of defendant's selection and school, of the other portion of the body upon which the other operation was performed.
6. ———: ———: ADMISSION OF EVIDENCE. In an action for damages against a surgeon for malpractice, where the allegations and prayer of the petition are based solely upon the defendant's alleged negligence and want of care in the performance of certain surgical operations and in the administration of medicines in connection therewith, at plaintiff's home and in defendant's hospital, it is prejudicial error for the court to permit plaintiff to testify that, at another time and place, during the several months interim between such operations, defendant made an indecent proposal to her.
7. Instructions examined and referred to in the opinion, *held* erroneous.
8. Appeal: REVERSAL. Where the preponderance of the evidence against the verdict of the jury is so great as to indicate that the verdict was probably the result of passion or prejudice, it will be set aside and a new trial ordered.
9. Evidence examined and set out in the opinion, *held* insufficient to sustain the verdict and judgment.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

C. C. Marlay, L. C. Burr, B. F. Good and S. A. Wood,
for appellant.

T. J. Doyle and G. L. De Lacy, contra.

at which time his molestations ceased, and shortly thereafter this action was begun in the district court for Lancaster county, to recover damages for alleged malpractice on the part of defendant in his treatment of plaintiff during the time above indicated. The jury returned a verdict in favor of plaintiff for \$7,200, upon which judgment was entered, and defendant appeals.

The substantial averments of the petition are:

1. That in the month of July, 1907, defendant carelessly and negligently, and without the knowledge and consent of plaintiff, produced an abortion of a living foetus, and thereafter removed plaintiff from her home to a hospital owned and operated by defendant, "and there put the plaintiff under the influence of an anesthetic and curetted the plaintiff, subjecting her to great indignities and great pain, and further lacerated and injured the plaintiff."

2. That about February 14, 1908, defendant advised plaintiff that a surgical operation was necessary, to shorten certain ligaments, and also suggested that he desired to remove plaintiff's ovaries; the latter of which plaintiff forbade; that the ovaries were not diseased, and it was not necessary to remove the same; that, notwithstanding such fact, defendant performed said operation, and did so in such an unskillful manner that plaintiff was unnecessarily lacerated and mutilated; that an anesthetic was administered to plaintiff by defendant; that no physician was called in to aid or assist in administering the anesthetic or in performing the operation; that while plaintiff was unconscious defendant, without her knowledge or consent, removed her appendix, cut and lacerated the

5. That prior to said assault "made upon plaintiff in the manner aforesaid by defendant" the general health of plaintiff was good; her constitution strong and unimpaired; plaintiff was then 32 years of age, a married woman with prospect of a long life, and the blessings and comforts and happiness of home and of rearing a family; that the assault and injury of the defendant "in the manner aforesaid" has rendered it impossible for plaintiff to conceive and to rear children, rendered her a constant and permanent sufferer, and that said injuries inflicted are permanent; that plaintiff has expended large sums of money in treatment and effort to cure the injuries inflicted upon her by defendant, in the manner aforesaid, in the sum of \$1,000, all of which has been necessary; that she has been compelled to live away from the presence and companionship of her only child and to be constantly separated from her husband on account of the condition of health thus inflicted upon her by defendant, and for the reason of the premises has sustained damages in the sum of \$50,000, for which amount she prayed judgment. Later, as an amendment to the petition, it was alleged that at the operation of May 11, above set out, defendant also made an incision in the plaintiff's body, extending from the lower part of the shoulder of the right side near the breast and continuing from there down around the breast, a distance of about seven inches; "cut and lacerated the plaintiff without her knowledge or consent, under the pretext that the glands of the breast were affected with tuberculosis and it was necessary to remove the same, and greatly irritated that said part of plaintiff's body by the cutting aforesaid, and did then put 22 stitches in said opening, and did said act in a careless and negligent man-

th v. Andrus.

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not wish her ovaries to be removed except as a last resort, but nevertheless would leave that question to the judgment and discretion of defendant, and she wished defendant to save them or one of them, if possible, and defendant alleges that said ovaries and Fallopian tubes were in a dangerously unsound and unhealthy condition and the appendix was dangerously unhealthy and unsound and so badly affected that he found it necessary to remove and he did remove one of the ovaries, the appendix and a portion of one of the Fallopian tubes, all the same being approved and advised by other attending physicians;" denies the allegations contained in paragraph 4 of the petition; and alleges that plaintiff was not in general good health, nor was her constitution strong and unimpaired as therein alleged; "that for a long time prior to the event alleged in said amended petition, and during all the time alleged therein, she had consulted and been treated by defendant and many other physicians and surgeons in regard to the same, and so informed the defendant;" and alleges that in all of his services and treatment of the plaintiff he used the best care, skill, services and endeavor to cure and restore plaintiff to good health, and in nowise omitted his duties or care towards her in any respect thereto. The reply is a general denial.

Prior to the alleged abortion in July, 1907, the history of plaintiff's physical condition is substantially as follows: In 1895, the year prior to her marriage, her health was in a precarious condition, causing her to fear that she was going into consumption. She was carried from the house to a carriage and from the carriage to a train and taken to Wyoming, in hopes that change of climate might be beneficial. At that time she was having hemorrhages, the cause of which is unknown, but they evidently led to the fear above suggested. Her health having improved, in 1896 she was married. When her first child was born she had convulsions of so severe a character that her attending physicians advised against her having any more children. When her second child was born she again

tion of the abdomen as to pain in the stomach, as to whether or not she had vomited and as to whether or not she had had menstruation previously, and as to what she thought was the cause of her condition, "she told me that she had had a great number of attacks of this kind at her monthly periods and thought it was due to her menstrual period at this time." He was asked: "Was there any reason or cause, in your opinion and judgment as a physician, that an abortion ought to be committed? A. I had no knowledge of the pregnancy previous to this time, therefore I had no right to conclude that an abortion could be produced." He further testified that the substance which was subsequently ejected was not an ordinary foetus, or child, but was what is termed a mole. He fully described to the court and jury the cause and character of a mole, and testified that where there is this deformity in growth the authorities state, and his own knowledge of cases of that kind is, that at about the fourth or sixth month these foreign bodies are removed by nature. He testified that he described the mass which had been ejected the moment he saw it, designating it to the plaintiff as a "large tumor." He also testified to having opened it, and that "there was no child of any description in this mass." The testimony of Doctor Nicholson and of the defendant, as well as that of plaintiff herself, negatives the idea that defendant on that occasion would have any reason to suspect that plaintiff was pregnant, or that the thought of producing an abortion could have been in his mind at the time he was treating her. Plaintiff now claims that she was about four and one-half months advanced in pregnancy. Each of the four months during her alleged pregnancy she had had her monthly period to a

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cian and surgeon since June, 1893, and by whom plaintiff had been examined prior to the operation, for the purpose of getting his ideas as to whether or not further surgical work was necessary. Defendant and Doctor Ramey both testified that upon opening the abdomen and making an examination they found both ovaries and the Fallopian tubes badly diseased. Defendant testifies that prior to this operation he had talked the matter over with plaintiff and her husband; that plaintiff again refused to consent to the removal of both ovaries, even though an examination should disclose that they were badly diseased, but that she consented to the removal of one, if it should be found necessary. The evidence shows that during this operation defendant and Doctor Ramey discussed the conditions as they found them and that everything that was done met with the approval of both. Doctor Ramey's testimony is that "the conclusion was that the work be done just as the doctor did it. It was necessary for the welfare of the patient." Doctor Ramey also testified as follows: "Q. Was there anything that was left undone that ought to be done? A. I would say that, according to my judgment, there was. Q. What was it? A. Had I been doing the work, I should have wanted to remove the right ovary in the same manner that we did the left one, and I so stated to the doctor. Q. At the time of the operation? A. Yes, sir." The defendant testified that at that time they removed the left ovary, but that as to the right ovary he removed the cysts which had formed, taking out the portion of the pedicel by which the cysts were fastened. "These were removed from the right ovary and the remainder of the ovary left on the right side, which she has at the present time unless it has been removed

imony by defendant were not true it is a very easy matter to have shown its falsification of the plaintiff would have shown that not she still retained her right ovary.

As to the right breast, which was done at the operation above referred to, is testified to by Doctor Ramey and Doctor Ramey. Their testimony is that there were two nodules or tumors in the outer part of the breast removed, also some enlargement of the breast, as stated by Doctor Ramey, the size of a medium hen's egg, and the other some enlargement. Defendant gives the size of these nodules as being much larger than that stated by Doctor Ramey. Doctor Ramey states that the growth was a foreign growth. Doctor Ramey testifies that he and defendant talked over the case and they found them, and what ought to be done. Doctor Ramey says: "And, if I remember correctly, more radical work than the doctor did."

Were they of such growth and substance that it was necessary to remove them? A. Yes; beyond a question." The testimony of Doctor Ramey is corroborated in many particulars by Mrs. Feers, both of whom are experienced surgeons. The operation was deemed necessary by the plaintiff and one other experienced surgeon, and was properly performed, is established by the clear and convincing testimony, and any right of action can be based upon the facts themselves.

As to the question as to whether there was any negligence on the part of defendant in the treatment of the plaintiff in these several operations. That the last operation, the one in the right breast, was properly performed after the operations was established. The failure to heal has not been established by the testimony outside of plaintiff herself, with reference thereto is very unsatisfactory. The failure of the wound to heal was

the result of plaintiff's diseased condition or from outside infection can only be conjectured. Mrs. Andrus and Miss Heers, the nurses, testified that after the operation plaintiff would put her hand under the bandages and raise them up so as to look at the wound; that they admonished her that she must not do that, but, heedless of their admonition, she repeated the performance at other times; and Mrs. Lee, a patient in the hospital, who had also been operated upon, testified that plaintiff showed her one of the wounds; that "she drew the bandage back upon her breast, and drew it back away, and called me in to look at it. * * * I told her right away I did not care to look at it, or something to that effect, and she wanted me to touch it, and I did not and I would not. And I told her she better leave it alone. Q. Did she touch it herself? A. Once she did. She was feeling over it with her hand and I went and called the nurse. Q. Did she remove the bandage from the wound? A. Well, she had it pushed back. Q. How far off of the wound did she push it? A. Well, I should judge I could see two or three inches of it. Q. Showed you the raw wound? A. Yes, sir." She testified that this was less than a week after the operation. This testimony was all contradicted by plaintiff, and it may be said that it therefore raised a question of fact for the jury. Under ordinary circumstances this would be true, but we do not think that the naked testimony of the plaintiff should be permitted to prevail over that of surgeons of years of experience both in the practice of their profession and as instructors in a medical college, and over the testimony of two nurses, and a disinterested patient in the hospital. If the condition of plaintiff is the result of infection from without, it cannot, so far as the evidence discloses, be ascribed to improper dressing and bandaging of these wounds. No witness has testified that they were either improperly dressed or bandaged. No witness has testified that the bandages slipped off or became loose, so as to expose the wounds to infection, while three witnesses have testified

plaintiff which may have caused the very
itch she now complains. Considering the
y, we think there is far more reason to
e failure of plaintiff to make a full and
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t exposure of her wounds.

ff was upon the witness stand, her coun-
re the witness stand and recline upon the
nd, with the assistance of a nurse, arrange
able so as to exhibit her right breast and
om the hip to the ankle. The jury were
to leave the jury box and pass around the
the portions of plaintiff's body exposed.
been done, counsel for defendant requested
lmeth, whom he had with him in the court-
him in medical examination, be permitted
: right leg and right breast of plaintiff.
for plaintiff objected, but finally permitted
make some examination of these parts.
endant also requested that Doctors Ramey
e permitted to examine the other breast,
to have a full understanding of this they
xamine the abdomen of this plaintiff also."
ed to upon the ground that, if they desired
plication, they should have made it before
the trial. It was insisted by counsel for
as a part of the matter had been gone into
the exhibition of a portion of her person,
entitled to go into the whole of the question
plaintiff both as to the operation in the
t in the abdomen; that plaintiff could not
them examine her limb and say that they
nine anything further, and cited section
le. While this discussion was going on,
f the table and resumed her place on the
Upon being denied the right of exami-
d, defendant requested that he himself

permitted to examine the left breast and abdomen as part of the transaction that transpired in the courtroom, and counsel for defendant stated that they desired to complete that examination as a part of the cross-examination. The hour for adjournment having arrived, the court withheld its ruling, and on the next day sustained the objection to the application by defendant to make such examination. The court also denied the request of defendant to appoint physicians and surgeons of the same school as defendant to examine the same parts which had been introduced in evidence by plaintiff, counsel limiting his request to the parts that had been exhibited to the jury. The request for permission to examine "the other breast" was clearly gratuitous. It was in no manner involved in the action. It had never been operated upon or treated by defendant, and no part of plaintiff's claim was based thereon. The fact that plaintiff voluntarily exhibited certain parts of her body, involved in the action, did not give defendant a right to examine other parts, not involved. That part of defendant's request was, therefore, very properly denied; but, in denying the other parts of the request, we think the court erred.

Counsel for plaintiff seek to justify the ruling of the court, under our holdings in *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; *Stuart v. Havens*, 17 Neb. 211. and *City of Chadron v. Glover*, 43 Neb. 732. In the *Finlayson* case the holding in the syllabus is: "It is not error for the court during the progress of a trial to refuse to order the plaintiff, who sues for injuries to his person, to submit to an examination of his person by physicians who are witnesses for the defendant, in the absence of any showing whatever that justice would be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury." From the opinion (p. 589) we learn that the request for an examination was made in the midst of the trial; that "the record shows that, when the witnesses on the part of the defense were placed upon the stand to testify upon

alleged injury, the defendant in error forward and allow the witness to examine did. The record further shows that error was 'asked to remove his coat and hat, and the witness examines the back, front and sides of the body of the plaintiff; also the condition of the eyes, the condition of the tongue and of the throat. It must seem that, even if the court was not usual to make the order, that error was a mere inadvertence made by consent of defendant. In the *Stuart* case we held simply that, "if a commission is desired, the application should be made before trial begins and experts agreed upon by the court." In the *Glover* case, paragraph of the syllabus, it is held: "It is proper in an action for personal injuries to appoint, on the application of the defendant, a commission of physicians to make a physical examination of the plaintiff, *quære*. If such action is proper, it should be made before the trial commences." We have said: "It has been twice intimated that it is the power of the court to make such an order." See *P. R. Co. v. Finlayson*, 16 Neb. 578; *W. & F. Fairbury*, 41 Neb. 881. In each case, the court disclaimed the intention of deciding whether it was necessary in either of those cases to make such an order as is necessary here."

It is true of this case. The question is whether it is error for the court, during the trial, to refuse to appoint a commission to examine the plaintiff. The question is, did the court err in not appointing the defendant, either in person or by counsel, to whom he had in court, to make further examination of the portions of plaintiff's body which were exhibited, and to examine the wound made and used by the incision made at the time of the injury. Up to the time that plaintiff

voluntarily made her body an exhibit, the cases relied upon by plaintiff might apply, but, when she saw fit to introduce her body as an exhibit in this controversy, we think defendant had a right to examine and submit to the jury, if he saw fit, any other part of that exhibit, involved in the action. Defendant had been charged with negligence in the performance of both operations—that upon the right breast and that upon the abdomen. It had been charged that, as a result of these operations and the treatment in connection therewith, plaintiff's health had been permanently injured and she had become afflicted with sores upon her right breast and hip and leg; and, when plaintiff introduced her body as an exhibit, she thereby waived the immunity from exposure of her person, to which some courts have held that all persons are entitled. Section 339 of the code provides: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." The several operations performed by defendant form the basis of plaintiff's claim of injury. Her claim, therefore, is based upon detached acts, one upon the breast, the other upon the abdomen, but both upon the same body; and, when that body was introduced in evidence for the purpose of showing to the jury one of those detached acts, the defendant had a right to examine and give in evidence the other.

In *Winner v. Lathrop*, 22 N. Y. Supp. 516, it is said: "I have been referred to no case, nor have I been able to find any, in which a party claiming a physical injury has first voluntarily submitted the injured part to the inspection of the jury as evidence, and has refused to permit the adverse party to follow up that examination,

opposite party in any manner which may have tended to reduce its probative force. When, for example, a piece of machinery or material, the character or quality of which is in issue, is exhibited to the jury, it is always competent for the opposite party to have experts examine it and give the jury their opinion of the quality of the material and the sufficiency of the machinery. When admitted in evidence, and its damaging effect has been accomplished, it cannot be withdrawn until the party affected by it has had opportunity to apply every test for the purpose of overcoming its force and effect. No reason can be urged why a different rule should be applied when an injured limb is the subject of inquiry. Defendant had the undoubted right in this case, at any time after the injuries had been shown to the jury, to have physicians examine the injured leg and testify, as experts, to its character and probable permanency. The question was not as to the right of defendant to have an examination of the injuries made, but as to the right to test the effect and reduce the weight of evidence introduced by plaintiff." And so in this case the question was not simply as to the right of defendant to have an examination of the person of the plaintiff, but as to his right, as stated by the Missouri court, to have the body, which had been introduced as an exhibit, examined by experts to test the effect and reduce the weight of evidence presented to the jury by the introduction of such exhibit.

In *Chicago, R. I. & T. R. Co. v. Langston*, 19 Tex. Civ. App. 568, the court say: "As this was the single specific ground of objection urged to their making an examination of the injured limbs, preparatory to giving an opinion, we come to the question, seeing that the ruling was probably prejudicial, whether the court erred in denying appellant's request for such preliminary examination. If appellee had not made profert of her injured limbs to the court and jury, the request to have experts appointed by the court to make an examination over her objection would present the question which has been repeatedly before the courts,

Booth v. Andrus.

tiff and her injuries?" the objection made by appellee's counsel should have been overruled and the witnesses permitted then and there, or at such other reasonable time and place as the court might appoint, to make the proposed examination and give the result of it to the jury. It seems to us that this would have been simple justice, and consequently that it ought to have been done, thereby avoiding the appearance of an *ex parte* trial on this important issue. No harm could have resulted from such a course. Upon this ground, therefore, we feel constrained to order a reversal of the judgment." This case was taken to the supreme court and there affirmed in 92 Tex. 709.

In *Chicago & N. W. R. Co. v. Kendall*, 167 Fed. 62, 71, the circuit court of appeals of our own circuit held: "Where the plaintiff, in an action for an injury to his knee, while on the witness stand voluntarily exhibited the injured knee for inspection by the jury, the defendant is entitled to require him to submit the same to a surgical examination, and the court has power independently of any statute to compel such submission." In the opinion, after considering *Union P. R. Co. v. Botsford*, *supra*, and other cases, the court say: "In the present case we are not dealing with an application for a surgical examination in advance of the trial. Here the plaintiff at the trial voluntarily exhibited his knee in open court for inspection. Having done this, it was beyond his power to arrest the investigation. The defendant and the court were entitled to employ any agency in its examination which would aid in the determination of the issue on trial. It is universally held that, where an inanimate object is produced upon the trial of a case, it is subject to any legitimate examination and test which will elucidate the matter in dispute. It may be submitted, for example, to chemical treatment, or to examination by the microscope. Simply looking at the plaintiff's knee with the eye of a layman furnished little aid in determining its condition. He himself maintained that there were no external evi-

petition, do not lay a foundation for this testimony, then clearly none was laid. In passing upon the objection the court said: "Had I been able to interpret this petition as laying the foundation for matters of a scandalous character I would have struck it out. The petition does not apprise me of anything of this character to be proved, but I am inclined to admit this testimony, notwithstanding the shape of the pleading. I think the petition should have stated plainly if an incident of this kind was to be proven, that the defendant would know what he was charged with, and that he might have an opportunity to prepare for it at the trial. The petition don't apprise the defendant that this sort of testimony would be offered. However, it is part of the conversations between the plaintiff and defendant, and I am going to overrule this motion and hear the testimony." Here the court gave a clear, clean-cut legal construction of the pleading, but followed it with an erroneous ruling. The testimony offered was entirely foreign to the issues. It could shed no light upon the question as to whether the defendant had skilfully or negligently performed the surgical operations complained of. In fact, from every point of view, it was improper and should have been excluded. That evidence of this character would probably be seriously prejudicial to defendant seems to us is not open to discussion, and we have no doubt but that it was largely responsible for the very liberal verdict of the jury.

Instruction No. 6 defined malpractice as "the bad professional treatment of disease, pregnancy or bodily injury, from reprehensible ignorance or with criminal intent." As an abstract legal proposition, or if based upon pleadings charging "reprehensible ignorance" or "criminal intent," the instruction would be correct, but a trial court has no right to state in its instructions to the jury an abstract legal proposition that is outside of the issues. In this case neither "reprehensible ignorance" nor "criminal intent" is charged. The charge is negligence, and we think the court would have been more accurate if it had told the jury that malpractice within the issues ten-

Exchange Bank v. Clay Center State Bank.

Walker addressed to the cashier and managing officer of defendant the following letter: "I have a few excess loans and I may want to send you some of them, until after we are examined I don't want any excess loans, when examiner is here, and he may come most any day and may not for a month or so, now I wish to know if you can handle them I will charge your account, and you give us credit for the amount, this way it will throw the balance in our favor, and you would treat our account then the same as a deposit account, subject to check so in that way it would not show due to other banks, but would be included in your subject to check account, but this would cut your cash reserve down the amount that we owe you but you have a good reserve, so it would not make much difference, or we might exchange some notes if you did not wish it this way you can let me know and I will send them over to you, if agreeable and after the examination you can return again to us, I want to carry the loans, but can't now as we will be examined soon and they will be excess loans, so you will see the point I am trying to make. I will also compute the interest. I remember what we talked of at Schwab's sale but had forgot it, so will go over this as soon as possible and count up the extra 1% to Feb'y 1st, or Jan'y 1st, and from then on 3% as agreed to. Hope you are O. K., I am feeling good except a bad cold I can't get over, let me hear from you at once and oblige, I am yours truly, J. O. Walker, Cashier." The evidence shows that, in accordance with that letter, Walker sent to defendant a promissory note dated September 20, 1906, for \$5,000, due six months after date, payable to plaintiff bank, and signed by C. W. McMaster and E. McCann. When that note was mailed to defendant it was indorsed "without recourse." When received by defendant it was placed to the credit of plaintiff upon defendant's books. On May 23, 1907, Walker addressed another letter to the cashier of defendant, in which he uses this language: "I will send you a written guarantee as to notes so you can file same away

Exchange Bank v. Clay Center State Bank.

Ong at the time this note together with some others were transferred here. This leaves a balance of \$610.91 due the Exchange Bank of Ong as shown by our books." On the next day Miss Walker replied as follows: "Mr. F. T. Swanson, Cashier, Clay Center, Nebr. Dear Sir: Replying to your letter of the 23d inst., will say that we herewith return the C. W. McMaster \$5,000 note which we held for collection. We do not see at this time any prospect for collecting same, and therefore return it to you. You say in your letter you have charged our account for said note and interest. This note was never owned by this bank, it was never run on our books, and you received it without recourse. Please credit our account again, for we cannot pay the note. Very truly yours, Grace L. Walker, Cashier."

The only matter in controversy here is this note. Upon the trial the district court excluded the testimony offered by defendant in support of its alleged contemporaneous oral agreement that plaintiff would guarantee the payment of the note in controversy, on the ground that it tended to vary the terms of a written instrument; and it is urged by plaintiff here that, "under the terms of this written indorsement, the defendant, when it purchased the original note and accepted the renewal notes, contracted with the plaintiff that the plaintiff should not be liable thereon or for the payment thereof. This written indorsement cannot be contradicted, varied or explained by evidence resting in parol." This contention is in line with the holding of the district court, but we think the rule in this state is settled adversely to plaintiff's contention. In *Norman v. Waite*, 30 Neb. 302, we held: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the

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Cooper v. Coad.

that the letter does not refer to the note dated March 20, 1907; that it may or may not refer to the note dated September 20, 1906, or to the other notes or some of the other notes which were purchased from plaintiff by defendant in February, 1907, the time the McMaster note was purchased; that it may or not refer to still other notes bought by defendant at some other time than February, 1907. This argument is not convincing. The letter is too plain to be misunderstood. It says: "*This* note was never owned by this bank, it was *never* run on our books." This language is used in connection with the McMaster note set out in the letter, and the use of the word "never" clearly shows that the cashier had reference not only to the last renewal note, but to all of its predecessors.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM COOPER, APPELLEE, v. MARK M. COAD, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,758.

1. **Principal and Agent: AGENCY: EVIDENCE.** Evidence examined and set out in the opinion, *held* sufficient to establish a general agency on the part of defendant's agent, for the sale of the horses in question, and sufficient to justify plaintiff in dealing with him as such.
2. ———: **AUTHORITY OF AGENT.** And that the services rendered by plaintiff were reasonably within the scope of the business in which defendant's agent was engaged.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

A. W. Crites, W. J. Coad and W. H. Herdman, for appellant.

Ooad.

E. Porter, Allen G. Fisher
b.

in justice court in Dawes
dgment, and defendant ap-
Upon trial in that court
ment for plaintiff, and de-

a liveryman and dealer in
county. Defendant was an
1 stallions, and was located
. In March, 1907, defend-
l, who, a number of years
ntendent of the horse ranch
of selling six stallions that
is a remnant of his former
retire from that business.
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to Hemingford, where he
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there about the middle of
g there he called at three
e last one being that of the
i when he called, and, after
f plaintiff's employees, Hall
all again that evening and
i accordance with this state-
ery stable after supper that
hat at that interview they
it he assured Hall that the
and that Hall agreed with
would assist in selling the

horses, he should receive as compensation for his services \$100 for each horse sold; that they thereupon went to the telegraph office, where Hall wired for the horses to be forwarded; that the horses arrived two or three days thereafter, and that he at once proceeded to do everything he could to assist in their sale; that with the help and assistance of plaintiff defendant sold one horse to Sherrill Brothers and another to Stevenson Brothers. Defendant in his answer denied the making of the contract by Hall, and further alleged that, if Hall did make the contract, his act in doing so was outside of the scope of his powers; that Hall had been employed by defendant for a stated compensation as his salesman and agent, with power only to sell and dispose of said animals and to care for and keep the same at defendant's expense pending such disposal; that he had no other or different power or authority, and that plaintiff at all of the dates named in the petition had full notice and knowledge of all of these facts. Defendant in his brief concedes that, the jury "having returned a general verdict in favor of Cooper, it must be conceded for the purposes of these appeals that Hall did so contract with Cooper." The question for our consideration, therefore, is whether Hall in making this contract acted within the scope of his authority as the agent of defendant. The only assigned errors argued in defendant's brief are: (1) That the verdict is not sustained by sufficient evidence; (4) that the verdict is contrary to the instructions given by the court; and (7) that the court erred in giving instruction No. 3 given upon its own motion. We will consider these errors in the order named.

Mr. Hall was introduced as a witness for defendant. He testified that he was a stranger in Crawford; that he "didn't know a soul." Plaintiff has lived in Dawes county for many years. He testified that he knows substantially every man and every horse in Dawes county. Hall was a stranger. He was there for the purpose of selling horses of a kind which are not purchased generally by people who own horses, but are only purchased by a man here

Cooper v. Hall.

was thoroughly acquainted with that line of business in that county that, if he would assist in obtaining purchasers and take his chances of getting his pay upon sales actually being made, he should receive a compensation of \$100 for each animal sold, and that, in the event of a failure to close a sale, he should receive nothing. Under the evidence before us, we think Hall was the general agent of defendant Coad for the purpose of selling those horses, and that he was clothed with power to bind defendant by any reasonable agreement he might make in respect to the business in hand.

In the light of the above holding, the giving of instruction No. 3, given by the court on its own motion, could not have prejudiced defendant, as it is immaterial that the court submitted the question of the apparent scope of Hall's authority, and did not elsewhere in its instructions define apparent scope of an agent's authority.

We have carefully examined the instructions given by the court and do not think there is any merit in defendant's contention that the verdict is contrary to such instructions.

The case was properly submitted to the jury, upon evidence sufficient to sustain the verdict returned. Two courts have found for plaintiff for the full amount of his claim and there the matter should end.

AFFIRMED.

WILLIAM COOPER, APPELLEE, v. J. H. HALL, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 16,759.

APPEAL from the district court for Dawes county.
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

A. W. Crites, W. J. Coad and W. H. Herdman, for appellant.

Grout v. Meyer.

plaintiff himself until March 1, 1909, and by his agent for the remaining two months, fed and cared for the cattle. The only real controversy in the case is over defendant's counterclaim for five head of cattle which he claims were missing at the time he retook possession on May 1. There was a trial to the court without the intervention of a jury, which resulted in findings and judgment for plaintiff for \$340.08. Defendant appeals.

The month of April, 1909, ended on Friday. Plaintiff's agent, in charge of the cattle, testified that on the Sunday previous defendant promised that he would take the cattle away on Friday, April 30; that on that day he hauled four loads of hay to the pasture or corral where the cattle were being kept and fed it to them; that this was the last hay he had; that on the day previous he had counted the cattle and they were all there, and that on the evening of April 30 he closed the gate and securely wired it. Mr. Munsinger, a disinterested witness who resided within five rods of the corral, testified that the cattle got out that night. He was unable to state the time exactly, but fixed it somewhere about 11 o'clock. As to the conditions next morning, he testified that he was familiar with the gate; noticed it the evening of April 30; that it was wired up as testified to by plaintiff's agent; that he examined the gate "to see why the cattle had gotten out, and found the gate lying straight out, turned straight out and the cattle were all out on the meadow;" that this was the only opening in the fence through which they could have passed; that the other gates were all closed; that the gate stood straight out from the fence. Upon being interrogated by the court, he testified that the gate was not broken, but had by some means been thrown wide open; that the cattle did not seem to have touched the gate when they came out. On cross-examination he testified that the wire with which the gate had been fastened was "thrown down about three feet from the post where it was wired up to the gate." He drove or assisted in driving the cattle back into the pasture. He

testified as to having counted the cattle twice that morning. His first count was 207 and his second 202, which would be the right number. Defendant testified that he went to get the cattle in the afternoon of May 1; that his son and a gentleman who happened to be passing by were with him and found there were only 194, which would be five head short; that he hired a man to assist him to look for the cattle; that they succeeded in finding three, but that five of his largest steers never were found, and that the value of those steers and the expense of hunting for them he claimed damages in the sum of \$295.

It will be seen that the testimony of plaintiff's agent, as to the closing of the gate and fastening it with wire on the evening of April 30, is corroborated by Mr. Munsinger, and the testimony of the latter, as to the position of the gate and of the wire which had fastened it the night before, is uncontradicted. In the light of this testimony, we are not prepared to say that the district court erred in holding, as it must have done, that the escape of the cattle from the corral on the night of April 30 was not due to any negligence on the part of plaintiff or his agent. It is evident that someone opened the gate that night, under the conditions described by the witness Munsinger, and that negates the idea that the cattle broke out. The duty of plaintiff was to use reasonable care and diligence in the keeping and caring for the stock. If the five steers of cattle, which were never found, were stolen that night, plaintiff would not be liable for their loss; and, as five head in controversy were not found, after the diligent search which defendant testified to having made, the inference is very strong that they were stolen. Even if they were not stolen, if the opening of the gate on that night was the act of some evilly disposed person—an act of vandalism—we do not think plaintiff should be liable for the steers which strayed away after they had thus been turned out. Upon a review of the whole record, we think the district court was right in holding that plaintiff had fulfilled his contract. As will

State v. Trainor.

be seen, the case is purely one of fact. No questions of law are involved which require consideration. The trial court saw the witnesses upon the stand and made its findings. We cannot say that the findings are not sustained by sufficient evidence.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. THOMAS HOCTOR ET AL., RELATORS AND APPELLEES, V. PATRICK J. TRAINOR ET AL., RESPONDENTS AND APPELLANTS.

FILED SEPTEMBER 28, 1912. No. 17,765.

1. **Mandamus: ELECTIONS: VOLUNTARY SURRENDER OF OFFICE.** Respondents, who held the offices of mayor and city clerk, respectively, were by a writ of mandamus ordered to call a primary and a general election, in advance of the time when, as they contended, such election should have been called. They complied with the command of the writ by calling such elections. Thereafter, upon presentation of their certificates of election by the persons elected at such election as respondents' successors, respondents turned over their respective offices, together with all of the books, papers and documents pertaining thereto, to their said successors, who have ever since held and are now holding and administering the same. *Held*, That the surrender of their said offices by respondents was voluntary on their part.
2. **Appeal: DISMISSAL.** And in such a case an appeal by respondents of such mandamus action, prosecuted to this court after such voluntary surrender of their offices, will, upon motion, be dismissed, on the ground that a decision in this court in such action could afford no actual relief and would be followed by no practical results.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Dismissed.*

Brome, Ellick & Brome and Benjamin S. Baker, for appellants.

the office of city clerk to succeed the respondent Good. The returns of both the primary and general elections were duly canvassed by the proper authorities of the city, and Mr. Hoctor and Mr. Wheeler were declared duly elected to the offices of mayor and city clerk, respectively; whereupon, the respondents delivered up to their said successors their respective offices and all of the books, papers, and documents pertaining thereto, and such offices have ever since been administered by such successors. Nothing further was done in the case by the relators until after this court on June 22, 1912, handed down its opinion in *State v. Ryan, ante*, p. 696. In that case we held the amendment of 1911, above referred to, to be valid. Thereupon respondents filed their appeal in this court. Relators now move to dismiss the appeal upon several grounds, among which are: "(3) For the reason that the judgment of the lower court has been fully complied with, by the appellants herein, and that any judgment that this court might enter could not be enforced, as the time for any relief to appellants herein has long since elapsed;" and "(4) for the reason that any questions that might now be presented to this court in this action would be nothing but moot questions, and would not afford relief to either of the parties herein."

The motion appears to be meritorious. When the district court made its finding in favor of the relators and ordered the writ to issue as prayed, the respondents acquiesced in the judgment so rendered. They made no application to the district court for a supersedeas, which that court would have had power to grant (*Cooperrider v. State*, 46 Neb. 84; *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755), but, without further remonstrance or any attempt at appeal, they turned over their offices to the parties elected at the election called by them in obedience to the order of the district court. The writ issued by the district court did not command respondents to turn over their offices. It simply ordered them to call a primary and a general election. When they issued their calls for

State v. Mayor and Council of City of Hastings.

438, it is held: "An appeal by a board of supervisors from a judgment in a mandamus proceeding, directing them to levy a tax for school purposes, will be dismissed upon motion, where it appears that after the judgment, and before the taking of the appeal, the board voluntarily complied with the mandate of the trial court by levying the tax."

In *State v. Napton*, 10 Mont. 369, the court uses language which is apt here: "A judgment of any kind from this court would present a peculiar result. An affirmance would be to direct the district court to issue a writ, which that court has already issued, and which has been obeyed. A reversal would be to say to the lower court, you may not order the clerk to do that which he has already fully performed. It is apparent that there is no controversy before us. The case is fictitious."

As this case now stands, it presents nothing, outside of a question of costs, except a moot question, and, as said in *Betts v. State*, *supra*, the matter of costs "will not alone afford such a subject of controversy as an appellate court will consider."

The motion is sustained and the appeal

DISMISSED.

STATE, EX REL. JAMES A. BENSON, APPELLER, V. MAYOR AND
COUNCIL OF THE CITY OF HASTINGS, APPELLANTS.

FILED OCTOBER 18, 1912. No. 17,504.

OPINION on motion for rehearing of case reported *ante*,
p. 304. *Rehearing denied.*

PER CURIAM.

This cause was argued and submitted, and in due time a decision was rendered. The opinion is reported *ante*, p. 304. A motion and briefs for rehearing were filed, and,

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- cript and bill of exceptions, but not conclusions of counsel.
Carlson v. City of South Omaha 215
6. Where a cause involving equitable principles is appealed on the merits, objections to the procedure on appeal should be made by motion or otherwise, and not withheld until the filing of briefs on final submission. *Bresce v. Ormsby*..... 399
7. Under sec. 145 of the code, where a judgment responds to the issues and is just, a court of review may disregard any error which does not affect substantial rights. *Hill v. Hospe Co.* 413
8. Where a judgment is reversed on appeal without specific instructions, the trial court has no discretion to dismiss the action without further proceedings. *Sowerwine v. Central Irrigation District* 457
9. Decision on former appeal of question of plaintiff's right to maintain the action becomes the law of the case. *Fitzgerald v. Union Stock Yards Co.*..... 493
10. A verdict inconsistent with itself must be set aside upon application of all parties prejudiced thereby. *Zitnik v. Union P. R. Co.* 679
11. In an action against a railroad company and its engineer for negligence, where the jury found that the engineer was not negligent, and there was no evidence of negligence of other employees, plaintiff and defendant company both having appealed, a judgment against the company will be reversed. *Zitnik v. Union P. R. Co.* 679
12. The supreme court will not review errors at the trial, unless a motion for new trial was made and a ruling obtained thereon. *Weller v. Sloan* 122
13. In absence of motion for new trial, a judgment sustained by the pleadings will ordinarily be affirmed. *Weller v. Sloan* 122
14. On appeal, no motion for new trial having been filed, the supreme court will ascertain only if the pleadings state a cause of action or defense and support the judgment. *Tait v. Reid* 235
15. Errors not specifically assigned in the motion for new trial will not ordinarily be considered on appeal. *Murten v. Garbe* 439
16. Affidavits in support of motion for new trial, which are not included in a bill of exceptions, cannot be considered on appeal. *Duffy v. Scheerger* 511
17. Conjectural opinion of expert, based solely on a hypothetical

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service of summons, and gives the court jurisdiction.

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Assault and Battery.

1. In an action for trespass upon the person, weight of evidence is for the jury. *Kramer v. Weigand* 47

2. Rule in civil actions that preponderance of evidence proves any issue applies to a civil action for trespass upon the person. *Kramer v. Weigand* 47

Attachment.

Judgment in attachment, without personal service or appearance, is binding on the property only, and not an adjudication of the personal liability. *Lincoln Grain Co. v. Chicago, B. & Q. R. Co.* 203

Attorney and Client. See CHARITIES. OFFICERS, 4.

If a judgment debtor pays an attorney the amount of his lien without the consent of the judgment creditor, the burden is on the judgment debtor, in an action between himself and the owner of the judgment, to prove the validity of the attorney's lien. *Hume v. Peterson*..... 347

Bills and Notes. See CORPORATIONS, 1, 2. EVIDENCE, 6.

1. A note payable to a company, and indorsed by an individual, held not to constitute the transferee a holder in due course, under sec. 30 of the negotiable instruments act. *First Nat. Bank v. Kelgord* 178

2. Where payment of a note is received by the payee from a stranger to the paper, that the payee marked the note "paid" is not conclusive, but may be rebutted by oral evidence. *In re Estate of Gamble* 199

3. A bank held to be an innocent purchaser of a note transferred to it by the payee as collateral security. *Farmers Bank v. Dixon* 652

Bridges. See COUNTIES AND COUNTY OFFICERS, 2-4.**Brokers.**

1. Where there is no limit of time to an agent's authority, it may be revoked at any time. *Maddox v. Harding*..... 292

2. Where pending negotiations for a sale of land are consummated by the owner after the revocation of the broker's authority, he will be entitled to commissions. *Maddox v. Harding* 292

3. Where parties to an exchange of lands knew that the same agent represented both, such dual agency cannot be interposed by either as a defense in an action for stipulated commissions. *Maddox v. Harding* 292

Continuance—Concluded.

2. Where, in absence of senior counsel, the court appointed an experienced attorney to aid junior counsel in defense of accused, and refused a continuance, *held* no abuse of discretion. *Becker v. State* 352

Contracts. See EVIDENCE, 8, 9.

1. The interpretation which parties to a contract put upon it may, in that respect, determine their rights under it. *Sibert v. Hostick* 255
2. The words "from the first day of January, 1902, to the 31st day of December, 1902," in a contract between a city and a contractor who agreed to furnish materials and construct sidewalks when ordered, *held* to refer to the ordering of sidewalks, and not to the furnishing of materials and the construction. *City of Omaha v. Yancey*..... 261
3. In a contract of sale of merchandise, a provision that the good-will of the business is included does not imply an agreement that the seller shall not re-engage in such business. *Wessell v. Havens* 426
4. To establish an express contract, a definite proposal and an unconditional acceptance thereof must be shown. *Roberts v. Cox* 553

Corporations.

1. A corporation having no indebtedness when it executed a note for building materials cannot defeat recovery on the note because of a provision contained in its charter limiting the amount of its indebtedness. *Perry & Bee Co. v. Holbrook Opera House Co.* 19
2. Evidence *held* not to establish a defense to action on note of corporation. *Perry & Bee Co. v. Holbrook Opera House Co.* 19
3. Acts imposing additional conditions on rights of foreign corporations to do business in the state are not amendatory, where such conditions do not change those imposed by prior acts. *State v. American Surety Co.* 22
4. A judgment against each stockholder of an insolvent corporation for his proportion of the corporate liability is not a final disposition of the case, and, if some of the judgments are not paid, an application for further judgment against the stockholders is not a new cause of action. *First Nat. Bank v. Cooper* 624
5. Where judgment was rendered against stockholders of an insolvent corporation and executions thereon against some of the stockholders were returned unsatisfied, the failure to

Counties and County Officers—Concluded.

- division stream with a steel bridge, and recover from the other county as repairs. *Platte County v. Butler County*... 132
3. If one county replace three wooden spans of a division bridge with steel spans, it cannot recover from the other county as "needed repairs." *Platte County v. Butler County*, 132
4. Ch. 126, laws 1905, as amended by ch. 111, laws 1911, held to give county boards power to let contracts for bridges, culverts and road improvements to the lowest bidder, to reject any and all bids, and to purchase materials and employ labor and construct bridges and culverts. *State v. Coupe*.. 463

Courts. See QUO WARRANTO. TAXATION, 1.

1. Propositions advanced in an opinion not essential to the judgment pronounced are not to be regarded as final determinations or as legal precedents. *McCaffrey v. City of Omaha* 484
2. The county court has exclusive, original jurisdiction of probate of wills and settlement of estates, and its final orders within its jurisdiction are binding, and not subject to collateral attack. *In re Estate of Creighton*..... 654
3. An order of the county court in the settlement of an estate, by which distribution of the assets is made, is appealable to the district court, and, the proceeding being *in rem*, all persons interested in the assets are parties. *In re Estate of Creighton* 653
4. Controversies involving title to and ownership of real estate are not within the jurisdiction of county courts. *Bell v. Dingwell* 693

Criminal Law. See CONTINUANCE. EMBEZZLEMENT. FOOD. INDICTMENT AND INFORMATION. KIDNAPPING. LARCENY. NEW TRIAL. PEDDLERS. RAPE. ROBBERY.

1. Ch. 184, laws 1911, known as the "Indeterminate Sentence Law," held not to vest the prison board with judicial powers, in violation of sec. 26, art. V of the constitution. *Wallace v. State* 158
2. Sec. 117b of the criminal code, defining the crime of hog stealing, is an act complete in itself, and not amendatory of secs. 114 and 119. *Wallace v. State* 158
3. The purpose of sec. 117b of the criminal code, creating the crime of hog stealing, was to create an independent substantive crime, and it is not violative of any constitutional provision. *Wallace v. State* 158
4. Instruction as to weight of evidence of accused held not erroneous. *Wallace v. State* 158

Criminal Law—Concluded.

16. The practice of keeping jurors for lengthy periods without opportunity to sleep criticised, but *held* that the trial court did not err in refusing a new trial on account thereof. *Lambert v. State* 520
17. Where a farmer, who was the owner of a harness alleged to have been stolen, was permitted to testify as to the purchase price and the amount of wear it had received, and to give his opinion as to the value, *held* not error. *Lambert v. State* 520
18. Ch. 167, laws 1907 (Cr. code, sec. 117c), defining poultry stealing, *held* not to violate sec. 11, art. III of the constitution, relating to the enactment and amendment of laws. *Bartels v. State* 575
19. An instruction that the rule that requires proof of guilt beyond a reasonable doubt "is not intended to aid any one who is in fact guilty to escape," and that acquittal must be justified and a verdict of not guilty "authorized," is erroneous. *Bartels v. State* 575
20. The indeterminate sentence law *held* constitutional. *Williams v. State* 605
21. Where one was personally present at the commission of an offense, under circumstances leaving no doubt that his purpose was to participate in the act should occasion require, he is a principal. *Williams v. State* 605

Damages. See CARRIERS, 2. DEATH, 4. EMINENT DOMAIN. LANDLORD AND TENANT, 1. VENDOR AND PURCHASER, 1, 2.

1. In an action for personal injury, plaintiff cannot recover damages sustained in a special occupation, unless they are alleged and proved. *Yorty v. Case Threshing Machine Co.* 449
2. A verdict for \$20,000 for causing the death of a brakeman, earning \$80 a month, at age 39, *held* excessive. *Hoffman v. Chicago & N. W. R. Co.* 783

Death. See NEGLIGENCE, 9-12.

1. Evidence *held* to support finding that injuries complained of were the proximate cause of death. *Albrecht v. Morris*.. 442
2. In an action for death, *held* not error, under the facts admitted and proved, to charge that decedent was killed without negligence on his part while acting "under the direction of those in charge of the engine and cars where he was working." *Fitzgerald v. Union Stock Yards Co.*..... 493
3. In an action for death, whether a train with an engine in front was, under a custom of railroading, a signal that other cars should not be coupled onto it, unless by direction

Dower. See QUIETING TITLE, 4. TAXATION, 4.

Under sec. 20, ch. 23, Comp. St. 1905, the dower of a nonresident is limited to lands of which her husband died seized.

Burr v. Finch 417

Elections. See COUNTIES AND COUNTY OFFICERS, 1. MUNICIPAL CORPORATIONS, 18. SCHOOLS AND SCHOOL DISTRICTS. STATUTES, 11.

Any attempt by the legislature to provide for the election of police magistrates in any other manner, or at other times, than fixed by the constitution is void. *State v. Mayor*..... 304

Electricity.

1. The right to maintain an overhead trolley wire carrying a deadly current of electricity across railroad tracks imposes the duty of so maintaining it as not to injure persons lawfully operating trains of the railroad company. *Scherzer v. Lincoln Traction Co.* 407

2. An injury to a railroad employee from contact with an overhead trolley wire affords a presumption of negligence, requiring the party maintaining the wire to show that its dangerous condition was caused by an unforeseen agency beyond its control. *Scherzer v. Lincoln Traction Co.*..... 407

Embezzlement.

In a prosecution under ch. 170, laws 1907, for embezzlement of a crop by a tenant, it is not material when the relation of landlord and tenant began, or will terminate; it being sufficient if the tenant was in possession of the property when embezzled by him. *Murten v. Garbe* 439

Eminent Domain. See HIGHWAYS, 2. MUNICIPAL CORPORATIONS, 8, 9, 19. RAILROADS, 3.

The measure of damages for permanent injury to land by the construction of a railroad, no part of the land being taken, is the difference in its market value immediately before and after the construction. *Harris v. Lincoln & N. W. R. Co.*... 765

Equity. See QUIETING TITLE, 6.

1. Where equity has obtained jurisdiction it will adjudicate all matters in issue. *Bell v. Dingwell*..... 699

2. One fraudulently deprived of possession of real estate may join, with his suit in equity to recover title, a demand for accounting for rents and profits, and for partition. *Bell v. Dingwell* 699

Evidence. See APPEAL AND ERROR, 17-28. ASSAULT AND BATTERY. BILLS AND NOTES, 2. CRIMINAL LAW. NEGLIGENCE, 4, 7, 9, 12-16. OFFICERS, 3. PHYSICIANS AND SURGEONS, 4-7. RAPE. SALES. WATERS.

1. Offer of books of account held insufficient to authorize their

Evidence—Concluded.

are competent evidence in an action against both jointly, and neither is entitled to an instruction to disregard the admissions of the other. *Fullerton v. Fullerton*..... 649

Exceptions, Bill of. See APPEAL AND ERROR, 16, 24.

Executors and Administrators, See PARTIES. WILLS.

1. A legatee appointed executor, who delayed settlement of the estate, *held* not estopped from claiming interest on his legacy, where the value of the estate was enhanced by the delay. *Lewis v. Barkley* 127
2. It is the duty of the probate court, and of the district court on appeal, to state the entire accounts of an executor, who is a legatee. *Lewis v. Barkley* 127
3. On appeal from the allowance of a claim against an estate, the district court tries the case *de novo*, and must determine whether the claim was filed in time, and whether an amendment allowed by the county court was such a departure as amounted to filing a new and different claim after the time limited therefor had expired. *In re Estate of Gamble* 199
4. Amendment of claim for money advanced to pay notes *held* justly allowed. *In re Estate of Gamble*..... 199
5. Under sec. 226, ch. 23, Comp. St. 1901, if letters of administration are taken out by the widow or next of kin, it will be presumed that it was in behalf of all parties interested, and creditors may present their claims within the time limited by sec. 214 of the act. *First Nat. Bank v. Bradshaw*, 714
6. Sale and deed of homestead *held* valid as execution of a power given in a will. *Willier v. Cummings*..... 571

False Imprisonment.

Evidence *held* to sustain verdict for plaintiff in action for false imprisonment. *Duffy v. Scheerger* 511

Food.

Violation of a rule of the food commissioner that payment for cream purchased for commercial purposes should not be made on the day of the purchase *held* not punishable under secs. 9838, 9840, Ann. St. 1911. *State v. Elam*..... 460

Fraud.

1. Petition *held* to state a cause of action for damages for fraud. *Parsons v. Barnes* 116
2. Evidence in action for fraud *held* to sustain verdict for plaintiff. *Parsons v. Barnes* 116
3. Variance between the allegation and proof of fraud in the procurement of a release *held* immaterial. *Yorty v. Case Threshing Machine Co.* 449

Homestead—Concluded.

2. Money loaned by vendor to vendee to improve land purchased is not purchase money, under secs. 3, 4, ch. 36, Comp. St. 1911, subjecting a homestead to a vendor's lien. *City Savings Bank v. Thompson* 628
3. A dwelling-house moved from one lot to another held to retain its homestead quality. *City Savings Bank v. Thompson* 628
4. Where a widow, as guardian of minor children, exchanged land in a foreign state, owned by her and her children jointly, for land in this state, fraudulently taking title in her own name, she cannot hold it as a homestead as against the children. *Bell v. Dingwell* 699

Husband and Wife. See HOMESTEAD, 1. JUDGMENT, 2, 3. PLEADING, 6.

1. A married woman may make contracts only in reference to her separate property, or business, or on the credit thereof and with intent to charge her separate estate. *Union State Bank v. McKelvie* 728
2. In an action on a note, where the petition shows that defendant was a married woman at the time the note was executed, it should further appear that it was made with reference to, and upon the credit of, her separate property and with intent to bind the same. *Union State Bank v. McKelvie* 728

Indemnity. See JUDGMENT, 9, 10.

Indictment and Information.

An information which charged an offense as subsequent to the date on which the information was filed, or on an otherwise impossible date, held defective. *McKay v. State*..... 281

Injunction. See CORPORATIONS, 11. HIGHWAYS, 2.

Insurance.

1. Permission to foreign surety companies to do business does not create a contract, and, if it did, the state, under its police powers, has the right to regulate the business by additional legislation. *State v. American Surety Co.*..... 22
2. Where a collector for an accident insurance company, pursuant to agreement with a member, furnished the money for premium of the member on the pay-day and remitted to the company, held that the insurance continued in force. *Redman v. Fidelity Accident Ins. Co.*..... 89
3. The simultaneous repeal and re-enactment, in terms or in substance, of parts of a by-law of a fraternal beneficiary association preserve without interruption the re-enacted provisions. *Quick v. Modern Woodmen of America*..... 106

Intoxicating Liquors.

Petition for license *held* sufficient. *In re Hartwig*..... 779

Judgment. See ATTACHMENT. COURTS, 1, 2. NUISANCE, 3.

1. "The village Board of the Village of Curtis" is not a person, natural or artificial, authorized to sue or be sued, and a judgment nominally against it binds no one. *Adams v. Village Board of Curtis* 125
2. Where a married woman fails to make the defense of coverture to an action on a note, and allows judgment to be rendered against her, she is conclusively bound thereby. *Jones v. Knosp* 224
3. Where a married woman allows her separate property to be sold on execution, she cannot thereafter sue to set aside a sheriff's deed to the purchaser on any ground available to her as a defense to the action in which the execution was issued. *Jones v. Knosp* 224
4. A judgment of a justice of the peace, filed and indexed in the office of the clerk of the district court, is a lien on after-acquired property, and such property is subject to execution in satisfaction thereof. *Jones v. Knosp*..... 224
5. If process is served on a defendant in a wrong name, and he suffers a default, or omits to plead misnomer, he is concluded by the judgment, and in future litigation he may be connected with the judgment by proper averments. *Jones v. Knosp* 224
6. Where process is served on a defendant in a wrong name, he should appear and object by motion, in the nature of a plea in abatement, or he will be concluded by the judgment. *Jones v. Knosp* 224
7. Under sec. 82 of the code, providing for the opening of a judgment within five years, relief may be granted after the expiration of five years, where notice was given and a sufficient showing made within the statutory time. *Rine v. Rine* 248
8. On application for relief under sec. 82 of the code, providing for the opening of a judgment within five years, the authentication of an affidavit in support of the application may be amended after the expiration of five years; notice having been given within the time. *Rine v. Rine*..... 248
9. In an action against a contractor for the amount of a judgment against a city for damages resulting from his negligence, notice to him of the original action *held* sufficient to make the judgment therein binding on him. *City of Omaha v. Yancey*. 261

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 13. Where the petition alleges that a defendant cla
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Landlord and Tenant. See EMBEZZLEMENT.

1. In a suit by a lessee against the lessor for breach of contract for possession, the measure of damages is the difference between the rental value and the rent reserved, and in addition special damages shown to have necessarily resulted. *Sibert v. Hostick* 255
2. In an action for the value of corn sold defendant by plaintiff's tenant, evidence *held* to support judgment for plaintiff. *Harvey v. Bowman* 569
3. A lessee is not released from his contract to pay rent, where he abandons the premises without the landlord's consent. *Prucha v. Coufal* 724

Larceny.

1. Evidence *held* insufficient to sustain a conviction. *Wallace v. State* 158
2. Evidence *held* insufficient to support conviction of poultry stealing. *Bartels v. State* 575
3. Under ch. 167, laws 1907, providing a penalty for poultry stealing, if value of property stolen is less than \$35, the penalty as for a felony should not be inflicted, except in cases of habitual crime, or when the act is accompanied with circumstances of aggravation. *Bartels v. State*..... 575

Licenses. See NEGLIGENCE, 13. RAILROADS, 4.**Liens. See ATTORNEY AND CLIENT.****Limitation of Actions. See CORPORATIONS, 4. EXECUTORS AND ADMINISTRATORS, 3, 5. QUIETING TITLE, 5.**

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2. Suits for assessments made by the receiver of a mutual insurance company under direction of the court *held* not barred, though invalid assessments by the directors were made more than four years before. *McCall v. Bowen*..... 241
3. Where an action for false imprisonment was begun within one year from the time the cause of action accrued, the filing of an amended petition after one year *held* not the beginning of the action. *Duffy v. Scheerger*..... 511
4. Pleadings and evidence *held* to present a cause of action for fraud, and properly brought within the time limited by sec. 12 of the code. *Bell v. Dingwell*..... 699

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6. Evidence in action for death of employee held to establish negligence of defendant in the construction and manner of operating a coal chute and the track adjacent thereto. *Chase v. Chicago, B. & Q. R. Co.* 81
7. An employee accustomed to handle threshing machines held to have assumed the risk of his employment. *Yorty v. Case Threshing Machine Co.* 449
8. Employer held liable for negligence of employees, though one employee sued jointly with the employer was found not liable. *Yorty v. Case Threshing Machine Co.*..... 449
9. An employer is liable for the consequences, not of danger, but of negligence. *Brown v. Swift & Co.*..... 532
10. A servant of mature years and ordinary intelligence should take notice of the ordinary operation of familiar laws of gravitation and govern himself accordingly. *Brown v. Swift & Co.* 532
11. The law applicable to the furnishing of tools by a master is not always applied, where a simple implement is furnished by him to a servant of mature years. *Brown v. Swift & Co.* 532
12. Where a servant of mature years has operated a simple implement for some time, or where its use is so simple that he can at once perceive the safe way of operating it if exercising ordinary care, the master is not required to instruct him in its use. *Brown v. Swift & Co.*..... 532
13. Where a servant, on account of his youth and for want of instruction, fails to appreciate the risks of labor he is commanded to perform, and is injured, the master is liable. *Breedlove v. Gates* 765
14. Where a child nine years old was injured while engaged in dangerous work, it is for the jury to say whether he assumed the risk. *Breedlove v. Gates*..... 765
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- that name, cannot sue to redeem on the sole ground that he was not sued by his full Christian name. *Clark v. Hannafeldt* 504
6. Where a note and mortgage held as collateral for a debt of mortgagees are unconditionally surrendered to them, they are proper plaintiffs in a suit to foreclose. *Burns v. Hockett* 546
7. Where foreclosure is properly commenced by the mortgagees, it may be prosecuted in their names, though, pending litigation, they transferred their interest in the security. *Burns v. Hockett* 546

Municipal Corporations. See ACTION. CONSTITUTIONAL LAW.

NUISANCE, 1. OFFICERS, 2, 3. STATUTES, 10, 11.

1. To overturn a city ordinance on the ground that it is unreasonable or invades private rights, the evidence should be clear and satisfactory. *State v. Withnell*..... 101
2. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject. *State v. Withnell*..... 101
3. In the exercise of police power, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted, and when and how such police power should be exercised. *State v. Withnell*..... 101
4. Within constitutional limits, private property is held subject to proper rules regulating the common good and the general welfare of the people. *State v. Withnell*..... 101
5. In testing police regulations, the court should inquire whether they have relation to the public health, safety or welfare, and whether such is the end sought. *State v. Withnell* 101
6. Under statutory authority to define, regulate, suppress and prevent nuisances, acts of the city council may be held conclusive, if the subject of legislation might or might not be a nuisance, depending upon circumstances. *State v. Withnell* 101
7. The passing of an ordinance forbidding the construction of brick-kilns in a city may be a valid exercise of police power. *State v. Withnell* 101
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2. Where a good-faith effort, without negligence, is made to rescue one from a place of danger, wrongfully caused by another, the effort, even if unsuccessful, will not relieve the wrongdoer from liability. *Amend v. Lincoln & N. W. R. Co.* 1
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10. An instruction that "by contributory negligence is meant negligence on the part of plaintiff," held not prejudicial in view of other instructions. *Albrecht v. Morris* 442
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3. Prosecutions under sec. 1a, ch. 71, Comp. St. 1911, are highly penal in their nature, and the evidence must be clear and satisfactory. *State v. Donahue* 311
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